IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 126

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

AMERICAN NATIONAL INSURANCE COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF FOR AMERICAN NATIONAL INSURANCE COMPANY

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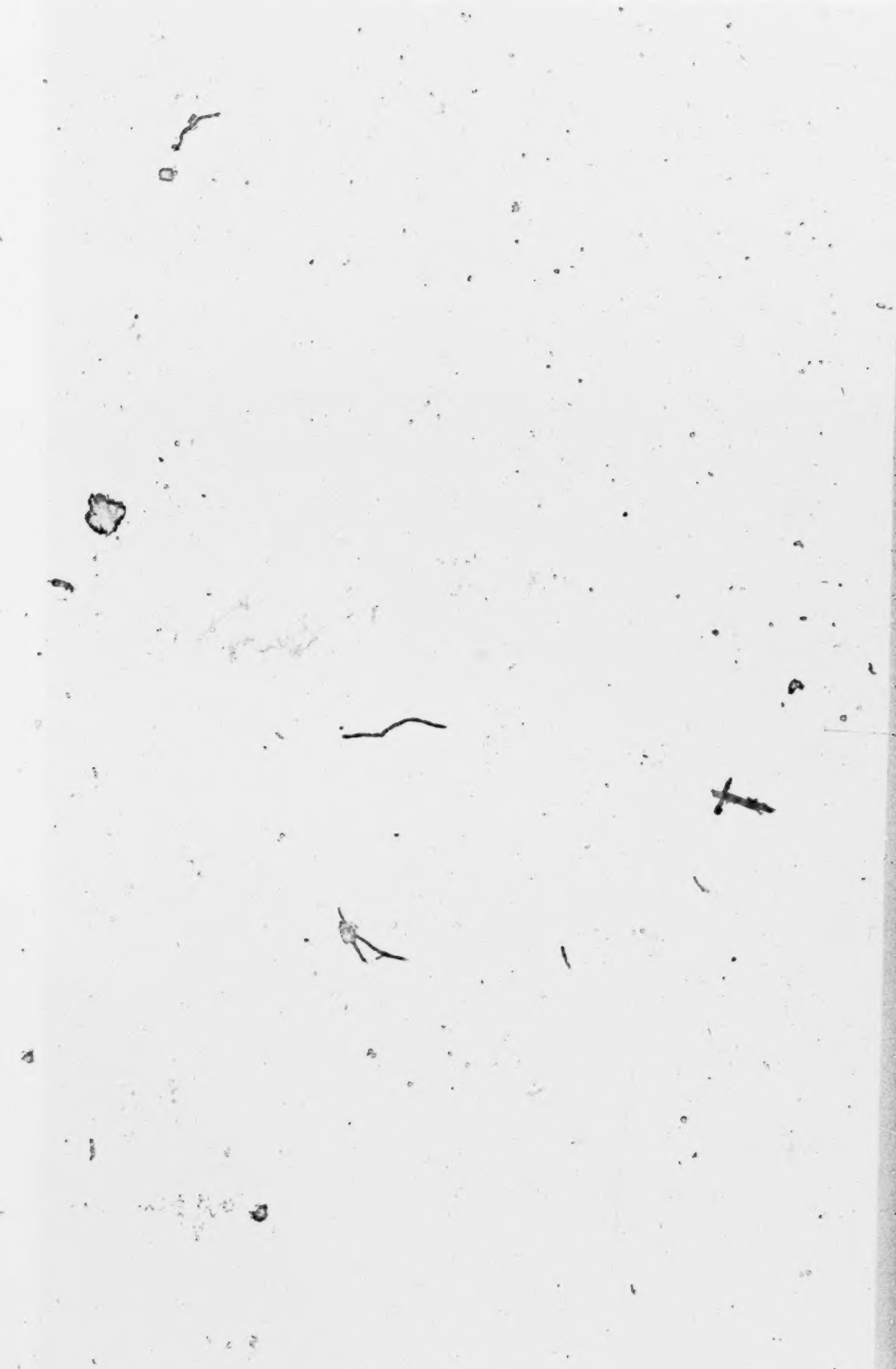

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Opinion to Which This Writ of Certiorari is Directed

This Writ of Certiorari has been granted to review an Opinion by the United States Circuit Court of Appeals for the Fifth Circuit reported at 187 F. 2d 307 which denied

in part enforcement of a Decision and Order of the National Labor Relations Board reported at 89 N.L.R.B. Reports 185.

Jurisdiction

The jurisdiction of this Court is correctly stated in Petitioner's Brief, and no questions are raised in respect thereto.

Questions Presented

I.

(a) Is the so-called "prerogative clause", being Article III in Respondent's contract with the Union assailed by the Board in this proceeding in and of itself unlawful or in anywise forbidden or prohibited, and if so, in what particulars and to what extent?

(b) If such clause is not in and of itself unlawful or in anywise forbidden or prohibited, how, then, can Respondent have been guilty of the violation of the Act found by the Board by reason of seeking the inclusion of such clause in its contract with the Union?

II.

Are not the factual determinations and findings made by the Court of Appeals below upon its review of the record, viewed as a whole,

(a) that there is no substantial evidence therein supporting the Board's finding that Petitioner has been guilty of refusing to bargain collectively with the Union, and

(b) that Petitioner, in law and in fact, has not been guilty of such unfair labor practice,

entitled to affirmance by this Court on the authority of UNIVERSAL CAMERA CORPORATION v. NATIONAL LABOR

RELATIONS BOARD, 340 U.S. 456, and NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH STEAMSHIP CO., 340 U.S. 453?

Introductory Statement

On the 13th day of January, 1950, Petitioner, American National Insurance Company, hereafter called the Company, having completed its negotiations in respect thereto with Office Employees International Union, A. F. L., Local 27, hereafter called the Union, entered into and signed with such Union a written contract covering all phases of rates of pay, wages, hours of employment, and other conditions of employment as to the employees in the Company's Home Office in the City of Galveston, Texas, within the bargaining unit represented by such Union, as to which any negotiation had been sought by such Union. Such contract, by its terms, remained in effect until July 12, 1951, and provided that it would thereafter be automatically renewed for additional periods of one year each, unless and until either party thereto gave to the other party written notice of its desire to negotiate changes therein. Such contract is set forth in full on pages 68 through 84 of Vol. I of the T. of R. before this Court. Prior to the expiration date of such contract the Union gave notice of its desire to negotiate changes therein, and additional bargaining between the parties thereto was then instituted for the negotiation of a new contract between them, which new contract was signed on August 10, 1951. Such new contract, by its terms, expires August 10, 1953, and in addition to a provision for automatic renewal, also provides for reopening for negotiation of wage rates only on August 10, 1952, in the event of increase in the B. L. S. Cost of Living Index as provided in such contract. In order that this Court may by comparison between such contracts discover the changes which resulted from such later negotiations, the presently

existing contract is printed as Appendix A to this Brief.

On the 5th day of April, 1950, the National Labor Relations Board, hereafter called the Board, with full knowledge that such original contract had been negotiated between and signed by the parties and in possession of a copy of same, entered its Final Order in Case 39-CA-33 styled In the Matter of American National Insurance Company and Office Employees International Union, A. F. L., Local 27, which Decision and Order held the Company to have been guilty of the unfair labor practice of refusal to bargain collectively with the Union in the negotiation of such contract in violation of Sec. 8(a) (5) of the Labor-Management Relations Act of 1947, hereafter called the Act. The Board further held that the Company's action in insisting on the so-called prerogative clause, appearing as Article III in said contract, constituted, per se, a violation of Section 8(a) (5) and (1) of the Act. A necessary result of such holding is to cast doubt upon the validity of the original contract negotiated between the Company and the Union, as well as the present contract in existence between them, which contains the same Article, because the inclusion of such Article has been found by the Board to have been obtained by an unlawful act of the Company. The Board's Decision and Order further specifically found and held under the heading "The Remedy", that "Effectuation of the policies of the Act requires that the Respondent (Company) be directed to cease and desist from refusing to bargain in good faith by imposing as a condition of agreement that the Union, as the exclusive bargaining representative of Respondent's employees in the appropriate unit, agree to a provision such as the prerogative clause involved herein," which simply means that the Company is, by the Board, specifically directed and admonished that it may not, in its further and future negotiations for renewal of

its contract with the Union, seek to retain the inclusion therein of such provision. By so doing, the Board sought to substitute and require its own concept as to what should or should not be in a collective bargaining contract between the Company and the Union for that of the contracting parties and further sought to coerce the Company in its future contract negotiations with the Union as to what should and should not be included in any contract between them.

Feeling that the Board had neither lawful nor reasonable right to do this, and in so doing had run considerably afoul of the over-all purpose and intent of the Act and the specific provisions of Sec. 8(d) thereof, and completely ignored and held for naught the holding of this Court in N. L. R. B. v. JONES & LAUGHLIN STEEL CORPORATION, relied upon by the Trial Examiner in his Intermediate Report [1] 'the Company sought and obtained a review of such final Decision and Order of the Board in the United States Circuit Court of Appeals for the Fifth Circuit, hereafter sometimes

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[1] **N.L.R.B. v. Jones & Laughlin Steel Corporation**, 301 U.S. 1.

"The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer 'from refusing to make a collective contract and hiring individuals on whatever terms' the employer 'may by unilateral action determine.' * * * The theory of the act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel. * * * The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion."

called the Court of Appeals below. A reading of the Company's Petition for Review filed with the Court of Appeals below appearing at pages 1 and 2 of Vol. I of the T. of R. is specially requested in order that this Court may know therefrom just what complaint the Company made in such Court against the Board's Decision and Order. The Board, in its answer to such Petition for Review sought enforcement of its Order in full.

The Company felt and has urged in its brief filed in the Court of Appeals below that the fundamental difference between it and the Union which pervaded and continued throughout the entire course of contract negotiations between them was simply one of concept as to the legal requirements of the Act controlling the technique of bargaining between the parties as to the reaching and consummation of a collective bargaining contract between them. Simply stated, the question is—"Is an employer required by the Act to agree that differences which may arise between itself and its employees within the unit represented by the Union during the existence of a contract between them, (1) as to the selection and hiring of such employees, (2) as to the discharge or discipline of employees for cause, (3) as to the maintenance by the employer of discipline and efficiency of employees, and (4) as to schedules of work, must be submitted for final determination to and resolved by outside arbitration?" We will attempt to show herein, as we did to the Court of Appeals below, that this question of arbitration, together with the question of wages to be paid, became from the outset of negotiations between the Company and the Union and remained thereafter until agreement was finally reached and contract signed, the only real differences existing between them which hampered and delayed final and complete agreement as to such contract. We will further attempt to demonstrate that at the very

outset of such negotiations, the Union concluded, and continued thereafter to maintain, that the Company was, by its refusal to agree to outside arbitration of such questions, attempting to deprive the Union of its rights guaranteed under the Act, and conversely, that the Company at all such times conceived and maintained that it had the lawful right under the Act not to agree with the Union as to such arbitration.

As background for this Courts' consideration in its determination of the issues involved in this proceeding, we submit the following:

History of the Case

It is abundantly apparent from the Record before this Court that the writers of this Brief have personally been in charge of contract negotiations for the Company since the very inception of this matter, and that if any mistakes of law or of propriety of bargaining technique have been made, they inescapably were and remain our mistakes. From this fact, however should flow the realization that, having been in the thick of the fight from the beginning, we must, of necessity, know, at least as well as any other persons concerned in the matter, exactly what went on during the bargaining between the parties, and the true nature of and real, underlying reasons for the positions taken and maintained by the Company during such negotiations. We also had to the best of our abilities studied the applicable provisions of the Act as to collective bargaining requirements and relevant decisions of this Court, as well as the various Courts of Appeals below, in an effort to obtain a reasonable understanding of such requirements. We, accordingly, respectfully pray that this Honorable Court, in considering and weighing our statement as to what happenings tran-

spired, as well as concerning our reasons for the taking and maintaining of positions, will accord to us not only sincerity of purpose but what we thought to be a reasonable understanding of the requirements of the Act as well.

All of the contract negotiations between the parties took place between the Union's committee, of which C. A. Stafford, one of its International Vice-Presidents was, except for some few meetings at which the Union was represented by an attorney, the chairman, and the Company's committee, of which Louis J. Dibrell, one of its attorneys, was chairman. The respective recollection of Stafford and Dibrell as to the negotiations appear in Vol. III and Vol. II of the T. of R. before this Court, and the Courts' attention is specifically invited thereto. From such record it appears that the Union, after having been duly certified as exclusive bargaining agent on September 2, addressed to the Company under date of November 13, 1948, its first written request for negotiation of a contract, pursuant to which request, negotiations were commenced between the parties on November 30, 1948. Meetings of a preliminary nature were held on such date, and again on December 15, 1948. At the second of such meetings, the Union completed its initial proposal as to a contract by adding thereto its demands for increase in wage scale and other proposals. Such originally proposed contracts and addendum thereto appears as General Counsel's Exhibits 8 and 9 on pages 48 through 63 of Vol. II of the T. of R. This Courts' attention is invited to such proposal, from which it will appear, as seems customary and usual in the approaches by Unions generally to contracts with employers, the Union started out "asking for the moon", thus reserving unto itself great latitude in receding from position and demands which it quite obviously never seriously proposed in the first place.

On January 10, 1949, the third meeting between the

committees occurred, which meeting has been characterized by Mr. Stafford, the Union's chairman, as follows:

> "We went into the meeting (January 10) to negotiate a contract. This was to be our first down-to-earth negotiation."
> (R. Vol. III, page 42.)

Early in the January 10, 1949, meeting, Mr. Dibrell verbally stated to the Union that at least one of the provisions which the Company thought ought to be contained in a contract between them was, in outline, what later became the so-called "prerogative clause", being Article III of the contract.

The basic reason for the taking by the Company of such position was its genuine and justifiable concern as to the workability of the arbitration provisions in the contract originally proposed by the Union. The Company's concern as to such arbitration was then and still remains its chief concern in the matter. Specifically, the Union had proposed that all promotions and demotions were to be made entirely on the basis of seniority which was to have been cumulative beginning with the date of first employment. Bearing in mind that this was to be the first contract to be imposed upon the operations of the Company which had been going on for more than 40 years, the Company, among other things, felt that seniority alone could not possibly be made the proper determining factor as to promotions and demotions. The Company further felt that the intelligent, efficient operation of its business required that its management continue to have and enjoy at least the normal and customary functions and prerogatives of management, which it then had. Ordinary observation of the practices normally followed by arbitrators had convinced the Company that the general result of arbitration was mere compromise of the

basic problems submitted to arbitration. The Company then believed, and still believes, that arbitrators normally do not resolve questions submitted to them for determination purely on the basis of the respective merits of the opposing sides of such controversy, but on the other hand, seek to find and enforce only such grounds for settlement as they believe the respective parties to the controversy should, by compromise, be willing to agree upon. From this, the Company reached the conclusion that arbitration as proposed by the Union would simply substitute the process of arbitration for that continued negotiation between the parties for the settlement of their differences, which, we think, is, in reality, contemplated by the Act. In other words it was thought that arbitration as proposed by the Union would simply amount to a negation of the principle of continued negotiations between the parties for the settlement of such differences as might arise between them.

In order to avoid this result, the Company proposed that there be no submission to and determination by outside arbitration of such questions between it and the Union as would, in probability, result during the existence of the contract.

Immediately upon such statement as to the Company's views, the Union went into deadlock with the Company upon the lawfulness thereof, as is evidenced by the following testimony of Mr. Stafford:

> "That came as a complete surprise to the Union. The Union has in the course of negotiations with various companies come face to face with prerogative clauses, but this is the first time in my experience I came face to face with such a clause. We explained to management, in the strongest language possible, that the agreement by the Union to such a clause would take away the right given us under the Taft-Hartley Act of 1947 in respect to negotiation of hours, rates of pay and

other conditions of employment."
(R. Vol. III, page 43.)

It is further made apparent that the Union at such time knew that the basic question then beginning to develop between it and the Company was not so much what prerogatives should be reserved to management, but was, rather, whether or not the decisions of the Company made in respect to same should be subject to review by arbitration, by Mr. Stafford's following statement:

> "The Company based their arguments on arbitration."
> (R. Vol. III, page 44.)

That both Company and the Union then understood the true nature of the disagreement that was then developing between them, as well as the views of each on the subject is clearly shown by Mr. Stafford's following testimony:

> "This is all January 10, and principally as I remember it were the proposals given to us earlier in the meeting on the prerogatives of Company. We told Company we were prepared to grant prerogative to management of the business in the fields we have no business to enter, but in those fields where we were certified as the bargaining agent, we definitely expected and would demand to retain the rights granted us by law.
>
> "Louis Dibrell informed us there was no law in the land that could force any Company to go to arbitration. That is a difference of opinion on arbitration."
> (R. Vol. III, page 44.)

Actually, if a meeting of the minds on the question of arbitration could have been at that time reached by the Union and the Company, a contract would have been then made between the parties. Mr. Stafford testified:

"Finally Mr. Dibrell stated to me, 'If we can agree, if the Union will agree to accept that prerogative clause, I can guarantee you a contract within an hour or two.' "
(R. Vol. III, page 47.)

But, instead of agreement, an actual deadlock developed as is evidenced by Mr. Stafford's following statement:

"We were deadlocked on II-a". (Later paragraph III of the Contract.)
(R. Vol. III, page 47.)

Almost immediately upon the Company's statement to the Union in the January 10th meeting as to its views in respect to arbitration, the Union began to accuse the Company of refusal to bargain collectively with it in good faith and then and there began the long and protracted argument on such subject, which continued, except during the meetings at which the Union was represented by an attorney, right down until the actual hearing before the Trial Examiner and which has continued pro and con throughout all of the briefs and arguments before the Board, the Court of Appeals below and still continues before this Court. The question in its inception was and still remains one as to whether or not the Company, in taking and maintaining its position as to arbitration, has acted contrary to the requirements of the Act as to collective bargaining.

The Union's attitude in the beginning and its reaction to the Company's such views was summarized by Mr. Stafford as follows:

"We could never agree to the prerogative clause even if he gave us five hundred dollars a month increase in there."
(R. Vol. III, page 48.)

As further evidence that a deadlock actually existed as early as January 12th, the existence of such deadlock having been later found as a fact by the Court of Appeals below, Mr. Stafford had the following to say as to such meeting:

> "It was also brought out at this meeting that under the Taft-Hartley Act Company did not have to recede from any position. That also went for the Union. Now, if the Union wouldn't recede and the Company couldn't, there was only one logical conclusion." (R. Vol. III, page 48.)

Meetings were adjourned on January 12th and reconvened on January 18th, at which time, the Company gave to the Union a complete counterproposal which contained in substance the same statement of the Company's position as to the rights of management and as to arbitration of decisions made in the exercise thereof as had been previously orally stated in the January 10th meeting. Its counterproposal is contained in Company's letter of January 17th, 1949, addressed to the Union, appearing as General Counsel's Exhibit 10, page 64, Record Vol. II.

A reading of this letter in relation to the Union's proposals which had thus far been submitted to the Company will demonstrate that it constituted a full and complete counterproposal, clearly and definitely defining and setting forth the Company's position and degree of willingness to agree on all phases of bargainable matters under the Act as to which the ~~Company~~ Union was seeking any agreement.

The Company, in submitting its counterproposal to the Union, was considerably more forthright and realistic than had been the Union in the submission of its original proposals. The employment by the Company of such bargaining technique in its approach to the matter has subjected it

to considerable criticism both in the Intermediate Report of the Trial Examiner and in the Decision and Order of the Board, because, insofar as we can tell from the most careful study of both of which we are capable, such bargaining technique is the sole subject of the attacks which have been levelled and are now levelled by the attorneys for the Board in their briefs to the Court of Appeals below and to this Court. It is, of course, the sole factual basis for the Trial Examiner's conclusion contained in his Intermediate Report that "Respondent never sincerely intended to bargain with the Union, but, on the contrary, was determined at the outset of negotiation to agree to nothing that would serve in any respect to enhance the Union's prestige or make it appear to the employees as an effective bargaining agency."

It likewise constitutes the only factual basis for the Board's observation set forth in its Decision and Order that "It is clear that from the inception of negotiation the chief obstacle to agreement was the respondent's inflexible position that it would not conclude any contract with the Union unless it accepted the Respondent's so-called prerogative clause either in its original or amended form as described in the Intermediate Report."

Thus, the ancillary, but closely related, question of law arises as to whether or not an employer in order to meet the requirement of the Act as to bargaining technique is required to start as far away from its real objective upon which it is willing to reach agreement as did the Union in this case following the usual and customary procedure of Unions in such matters.

In any event, upon receipt of the Company's counterproposal, in the January 18th meeting, the Union conceived the idea of soliciting and enlisting the aid of the National Labor Relations Board in its negotiation with the Company,

and Mr. Stafford so stated its position and intention as follows:

> "We received the counterproposal. I stated I didn't think they were bargaining, and I thought it was their duty to submit this counterproposal and I expressed the fact that I was going to have to go to the National Labor Relations Board in Fort Worth to find out whether or not they would have to give such a counterproposal. I was closing the meeting out because there was nothing being accomplished. All we could talk about was the prerogative clause, company's position, and the law, and we were getting nowhere fast. I couldn't agree they were bargaining at that time in good faith. I referred back to the statement Mr. Dibrell had made previously and earlier in the meetings, where he himself thought we were deadlocked. Now, I was agreeing with Mr. Dibrell—we were definitely deadlocked. And I didn't know what the next move was. I accused the Company then of not bargaining then in good faith."
> (R. Vol. III, page 56.)

At the request of the Company, another meeting was held January 19th, which closed on the following note, according to Mr. Stafford:

> "At the end of the meeting we got into another argument over the definition of bargaining. I stated to the Company they were not bargaining with me in good faith, trying to take away my rights as granted under the Taft-Hartley Act of 1947, and I was going to be frank about it, I was going to the Board and get a definition of bargaining, and not only that, I was going to consult some attorneys in Dallas to find out about it. And so far as I knew at the time, I would agree we were deadlocked and there was no use for any further meetings. Mr. Dibrell called in his secretary

and dictated the letter known as Exhibit 11 here (R. Vol. II, page 80), dictated a letter to me stating that I said we were deadlocked and they would meet me on February 7, and I took the letter and the meeting adjourned.

"Q. Did you agree to meeting with them on February 7?
A. No."
(R. Vol. III, page 62.)

Mr. Stafford was as good as his word. A Charge signed by A. G. Wilson, the Union's Business Agent and one of the members of the negotiating committee, was filed by the Union with the Board at Fort Worth on January 28th, accusing the Company, amongst other things, of refusing to bargain in good faith. Apparently, however, due to advice received by him from some other source, Mr. Stafford changed his mind about continuing negotiations with the Company, and on January 31st wrote a letter to the Company (R. Vol. II, page 85) agreeing to the Company's suggestion as to a meeting on February 7th. Such meeting was held, and it, and all subsequent meetings between the Company and the Union were carried on under threat of Board interference, resulting from the filing of such Charge. Apparently the Union felt or at least hoped that the Company, in the face of threatened interference and pressure from the Board, would recede from what it considered to be its lawful rights, but this result did not ensue. On the contrary, the Company, even after the conclusion of the negotiations and the execution of the resulting contract, still found itself required to protest before the Court of Appeals below the continued threatened interference of and pressure from the Board in respect to its lawful bargaining rights and still finds itself at this time before this Court required to seek in this certiorari affirmance of the holding

of the Court of Appeals below that it was and is entitled to continue to maintain its such lawful bargaining rights.

Another meeting was held February 23, and still another on February 24th, at both of which the same impasse resulting from the difference between the Company's and the Union's concept of what was required to meet the collective bargaining provisions of the Act on the question of arbitration still continued to exist.

Under date of March 3, Mr. Dibrell, as chairman of the Company's committee addressed a letter to Mr. Stafford, with a copy shown to Mr. John Thomas, Field Examiner of the Board in which the Company stated the positions taken by both parties at the February meetings. Such letter appears at page 88, Record, Vol. II, and reads in part as follows:

> "Please bear in mind that at our first negotiation meeting following receipt by us of a copy of the Charge which Mr. Wilson had filed before the Board against American National Insurance Company, when we asked you what the reason was for your filing the Charge consisting in part of the allegation that the Company was refusing to bargain collectively with you, you stated to us that the reason for such action was 'to make the company get in line.' It is very apparent that in your opinion the National Labor Relations Board has the power and authority under the Act to require this Company to recede from its position that its top management officials should be entitled to make final and binding decisions as to matters set forth in said proposals and to accede to the Union's demand that such questions be determined by outside arbitrations. While this Company stands ready to negotiate with you, it does not agree that such is the law.
>
> "In short, it is the position of this Company that if, in fact, a deadlock presently exists between the Com-

pany and the Union, in these contract negotiations, and that therefore, as stated by you in your letter, 'the time spent in such meeting would be lost by both parties', this is a situation of your making, not the Company's.

"We, therefore, suggest to you that upon reasonable notification, in writing, from you to the Company of your desire to resume negotiations in respect to this contract, such negotiations will be resumed by the Company at a time agreeable to you. If, in view of this letter you desire to meet with us on either March 10th or March 11th, please advise."

Further meetings were had in March during which the Union, for the first time, requested a copy of Company's rules and practices governing employees in its Home Office, *which were then in effect*. Under date of April 1, such then existing rules were furnished to the Union, with a suggestion that after they had given them such study as they wished, they were to contact the Company for the purpose of arranging further negotiation meetings. (Company's letter to the Union, General Counsel's Exhibit 24, R. Vol. II, page 95.)

At this point, we respectfully request of this Court that it bear in mind that the Union's request for "working rules" made in March covered only such rules as were *then in effect* and that such then existing rules were what was furnished to the Union. No negotiations were ever thereafter sought by the Union as to any changes in the scope and effect of such rules, even though it was at the time proposed by the Company in its so-called prerogative clause that one of the functions of management would be the "right to make such rules *not inconsistent with the terms of this agreement* relating to its operation as it shall deem advisable."

The bulk of the attack of the attorneys for the Board

both in their brief addressed to this Court, as well as in their brief addressed to the Court of Appeals below, has been upon the scope and effect of the so-called working rules furnished by the Company to the Union in March, 1949. Actually the contract as finally signed between the Company and the Union exhaustively covered the field of "Promotions and Demotions" in Article IV, "Discharge of Employees" in Article V, "Seniority" in Article VI, "Work Day and Work Week" in Article VII, "Wages" and "Holidays" in Article VIII, and the accompanying Exhibit A, "Vacations and Leaves" in Article IX, and "Paid Sick Leave" as Sec. 4 of Article IX, in accordance with the accompanying letter of transmittal under which such contract was furnished to the covered employees.

Any provisions, therefore, of the "working rules" furnished to the Union by the Company in March, 1949, which would have become inconsistent with the actual terms of the contract as finally reached would have, by virtue of such inconsistency, then become of no further force and effect, and the Company could not thereafter have made any new "working rules" or changes in existing "working rules" which would have been inconsistent with such contract. Of course, the Company, in March, 1949, had "working rules" then in existence which it had had for years. It was one of the very purposes of the contract negotiations then going on to analyze and re-evaluate such rules to the end that they should be kept consistent with the terms of any contract made between the Company and the Union. This is precisely what was done. And the Board's attorneys have not even attempted to suggest, must less demonstrate, the existence since January 12, 1950, of any working rule of the Company which is inconsistent with its contract with the Union. On the contrary, all that the Board's attorneys

have sought to do is to castigate the Company for having had at the time of and prior to the commencement of its contract negotiations with the Union certain working rules in effect which thereafter became inconsistent with the agreement reached with the Union and thereby, because of such inconsistency, became of no further force and effect.

It is said that the Company has abundantly demonstrated the perniciousness of such working rules by the fact that it unilaterally established certain night shifts of work and certain staggered lunch hours during the continuation of its negotiations with the Union. It has not been denied that these matters were discussed with the Union during such negotiations, even though the Union was not then invited to, nor permitted, to control the decisions in respect thereto, and it has not been and is not now, as we understand it, claimed that there has been any such unilateral action on the part of the Company since the existence of its contract with the Union. Nothing then remains except the suggestion that if it saw fit now to do so, the Company could and would establish unilaterally changes in the working conditions of its employees. Inasmuch as the presently existing contract between the Company and the Union exhaustively covers all phases of working conditions of such employees in a manner completely inconsistent with any supposed right on the part of the Company to alter same unilaterally, and without prior negotiation with the Union, it is submitted that such suggestion is wholly unfounded and baseless in fact.

In any event, after the then existing "working rules" had been furnished to the Union, further meetings were arranged and took place commencing early in May. At these meetings the Union was represented by an attorney, but nothing of substance was accomplished during them. They are noteworthy only because of the fact that at no time

during them did the attorney representing the Union accuse the Company of any refusal to bargain collectively in good faith with the Union. A new and complete counterproposal was at such meeting submitted to the Company by the Union through its attorney, which, with only minor changes, contained the same prerogative clause which had been previously submitted by the Company to the Union. The only substantive change in such prerogative clause now submitted by the Union to the Company was that it continued to provide for arbitration of the Company's decisions on matters covered by such Article.

In the meantime, a Complaint and Notice of Hearing on the Charge which had been filed by the Union against the Company in January was by the Board's Fort Worth Regional Office issued June 30, 1949, setting such Hearing before a Trial Examiner for July 26, 1949.

At the insistence of the Company, still another meeting was held between it and the Union's committee as late as July 25, 1949, the day before the commencement of the Hearing before the Trial Examiner. At that meeting it developed that only the following substantial points of disagreement still existed between the Company and the Union as to a contract between them:

1. Whether or not such contract should provide for 5, 6 or 7 paid holidays per year, and if 6, whether or not the sixth paid holiday should consist of two split half-holidays.

2. Whether or not the Company must agree to the inclusion in such contract of a provision for review by arbitration of the decisions of top company management in respect to the matters set forth as functions and prerogatives of management.

3. Whether or not any changes should be made in Article XII headed "Strikes and Lockouts" to meet the Union's objections to the refusal of the Company to provide in the contract for review by arbitration of such decisions, and if so, what changes or modifications.

4. What increases in rates of pay, if any, would the Company agree to.

This then, was the posture of the parties at the opening of the Hearing before the Trial Examiner and it continued to remain the same throughout such Hearing and until the filing by the Trial Examiner of his Intermediate Report on October 11, 1949.

The Company, the General Counsel and Messrs. Woll, Glenn and Thatcher, attorneys for the American Federation of Labor on behalf of the Union, all filed exceptions to the Intermediate Report. It seems to us conspicuous and revealing that such attorneys for the Union, faced with the specific findings of the Trial Examiner that, "There is no doubt that Respondent here had a right to insist upon the inclusion of the prerogative clause in any contract. I find contrary to the contention of General Counsel and the Union, that clause does not fail to accord to the Union the status secured to it by certification. Respondent had a right to insist that its decisions in regard to hire and tenure of employment be not reviewable by arbitration. It had a right to refuse to agree to an increase in wages, to the designation of additional paid holidays, or to the granting of other conditions of employment more favorable than those then existing. Assuming, but of course not deciding, that Respondent's employees were ill-paid and that Respondent could well afford to grant a wage increase, it was under no legal compulsion to do so. True, the Act recognizes (Sec. 1)

that inequality of bargaining power existing between unorganized employees and organized employers burdens commerce, but in ameliorating this condition, the Act protects employees in their right to self-organization only. Economic strength is still the underlying touchstone of success at the bargaining table," saw fit not to challenge such findings in any manner whatsoever (Vol. I, R. page 60). We are of the opinion that the reason such attorneys did not do so is because they found themselves, of necessity, in agreement with the Trial Examiner, just as did the Chief Judge of the Court of Appeals below who incorporated such exact language into a footnote to his opinion and specifically found that the law was correctly stated therein.

After the Intermediate Report was filed, nothing more was heard from the Union by way of request for further negotiation until the Company requested additional meetings which were resumed early in January, 1950. These last meetings were two in number. At the first, the Company proposed an increase in wages which was accepted by the Union, and the Union made the proposal appearing as Article IV of the Contract headed "Promotions and Demotions", which proposal of the Union the Company promptly accepted. The remaining trivial difference as to holidays was quickly ironed out, the duration of the contract agreed upon and complete accord as between the parties reached. At the second of such meeting, held January 13, 1950, such agreement, having been reduced to writing, was executed and it was agreed that a copy of same should be furnished each of the Company's employees within the bargaining unit, under cover letter signed by both the Company and the Union. This letter did go out, accompanied by a copy of the executed contract to each of such employees, and the Company, and the Union, and such Employees have been living together quite harmoniously since

such time under the terms of such contract as well as under the terms of the subsequently negotiated contract which is now in existence.

The Company and the Union being of the opinion that such developments should be of interest to and should be made known to the Board, the Company's attorneys then undertook to enter into a stipulation as to same with Messrs. Woll, Glenn and Thatcher for presentation to the Board for its consideration. Instead of agreeing to any stipulation, however, such attorneys took violent exception to the contract which had been negotiated and signed by their client, as well as to the "type of bargaining" which had produced same. Their letter of February 10, 1950, addressed to the Board appearing at page 62 (R. Vol. I.) characterizes the agreement as "hardly a model one" and insists that "it was entered into only because the course of conduct engaged in by the Company made it obvious that there had to be either this agreement or nothing, and so, in an effort to preserve the very existence of the Union, the contract was reluctantly signed". The last of such attorneys' observations above quoted is, of course, wholly without factual support in the record or elsewhere. They either did not know, or deliberately chose to ignore, the fact that the most objectionable part of the contract to them, being Article IV, Promotions and Demotions, was their client's own proposal. As to their observation that the agreement is "hardly a model one" we can not help wondering as to whether or not the underlying premise prompting such a remark is that any agreement, in order to be acceptable to them, must be a "model one" from the standpoint of the Union.

Upon receipt of a copy of such letter from the attorneys for the Union, the Company's attorneys filed with the Board under date of February 15th, 1950, the Motion appearing at page 63, Vol. I, T. of R. Thereupon the record

before the Board was complete as to the bargaining negotiations between the parties, and as to the contract that had been executed between them, in culmination of such bargaining. Nevertheless, and in complete disregard of the accomplishment between the parties of the end result contemplated and intended by the Act, the Board, on April 5, 1950, rendered its final Decision and Order appearing beginning page 85, Vol. I, T. of R., to which the Company's Petition for Review filed in the Court of Appeals below was directed.

Summary of Argument

I.

Upon the hereinbefore summarized record before it, the Court of Appeals below, after having observed that the Company's "whole complaint is directed, its whole effort at relief is confined, to setting aside as unfounded in law Paragraph I (a) of the Order and the Board's Finding and Conclusion that Petitioner had and has no right to insist upon the prerogative clause of the contract on the ground that, on the record viewed as a whole, the Board's Finding and Conclusion upon which this Order rests is not supported by substantial evidence and is not a lawful Order and that it may not be enforced, but must be set aside and vacated," specifically agreed with the Company, "that the provisions of the contract assailed by the Board are not illegal or in anywise forbidden or prohibited; that Petitioner had a right to urge and insist upon them; and that the evidence viewed as a whole does not (except for certain unilateral action taken) show any refusal of the Petitioner to engage in collective bargaining as that term is defined in the Act and in the decisions of the Courts."

Such Court further specifically stated that it was of the

opinion that the law is correctly stated in the quotation from the Trial Examiner's Intermediate Report set out in note 3 to the Court's opinion and hereinbefore quoted on page 23 and that the Company was not guilty of refusing to bargain in insisting on the prerogative clause.

The Court further specifically found that "the enforcement of Paragraph I (a) should be denied as unfounded *in law and in fact.*" (Emphasis supplied.)

The attorneys for the Board in their Brief and Motion for Rehearing addressed to the Court of Appeals below, as well as in their Petition for Certiorari and Brief on the merits filed in this Court, have consistently admitted that "the provisions of the contract assailed by the Board are not illegal or in anywise forbidden or prohibited." [2]

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[2] The following excerpts from such brief and Motion for Rehearing below and the Petition for Certiorari and Brief on the merits filed herein are relied upon for the foregoing observations.

1. "Finally, petitioner claims that the Board's order herein invalidates its current contract with the Union, without specifying the 'particular offensive provision,' and thus leaves petiioner in a dilemma as to the negotiation of future contracts. The alleged dilemma, we submit, is altogether fictitious. Nothing in either the Board's decision or its order invalidates petititioner's current contract with the Union or any provision in it. Petitioner's conduct, which the Board found unlawful, related to the means adopted by petitioner to restrict the Union's bargaining rights during the contract negotiations, rather than the inclusion in a contract of a provision which was in itself unlawful.

"The Board's order is plainly directed, not against a restrictive prerogative clause as such, but against repetition of petitioner's 'insisting as a condition of agreement, that the said Union agree to (such) a provision. * * * Nothing in the decision or order restricts the right of petitioner and the Union, through good faith bargaining, to reach an agreement that such a provision should be included in a future contract.

"Such an agreement by the Union would mean simply that the Union had waived, for the specified period of the contract, its statutory right to bargain about the bilateral establishment of the con-

Thus it stands undisputed and unassailed before this Court that the prerogative clause in question is a wholly legal one, not in any manner forbidden or prohibited, as to the inclusion of which in its contract with the Union the Company had a complete and lawful right to insist upon. If so, the Company can not in law be held to have been in violation of the Act by having so insisted.

II.

The Court below has further found as a matter of fact upon its review of the record viewed as a whole, that there

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ditions of employment covered by the prerogative clause." (Brief of the Board before the Court below, bottom of page 31, et seq.)

2. "In short, petitioner would reduce the case to the simple question of whether there was good faith bargaining as to the inclusion of an arbitration provision in the prerogative clause. Petitioner argues that an impasse was reached on the matter and then goes to some lengths to show that, under the Act, it may not be compelled to agree to subject its determinations to review by arbitration. Needless to say, we fully agree with the latter proposition." (Board's Brief before the Court of Appeals below, page 15.)

3 "And, if, in the instant case, petitioner had negotiated with the Union in good faith with respect to the matters mentioned above, and had found that, despite full consideration of their respective positions, the parties could not reach agreement upon any or all of the matters, then the parties would have reached a legitimate impasse, and petitioner's obligation to bargain with respect to those particular terms and conditions of employment would have been satisfied." (Board's brief before the Court of Appeals below, page 34.)

4 "Although it is recognized that the Union could have voluntarily agreed to surrender its right to bargain on these matters, the Board concluded that the company's conditioning of any contract at all on the Union's surrender of its statutory right to bargain about these particular subjects constituted bad faith bargaining, and also that it constituted, quite apart from the element of bad faith, a per se violation of Section 8(a) (1) and (5) of the Act." (Petition of the Board for Rehearing filed in the Court of Appeals below, page 2.)

is no "support in the evidence for the view that the employer, in insisting upon the prerogative clause, was any less in good faith than the Union was in resisting its inclusion," and has likewise found that "it was not, therefore, as the Board finds, the steadfastness of the employer alone in insisting on its point. It was the steadfastness of the employer and the Union—the one in proposing, the other in opposing a clause of this kind, which the employer felt it ought and the Union felt it ought not to have, which prolonged the negotiations. It was not any general unwillingness on the part of the Petitioner to negotiate a contract satisfactory to itself as well as to the Union."

This controlling fact question having been by the Court

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5 "This Court appears to have regarded the company's clause itself as if it were an ordinary subject of collective bargaining such as wages, hours, and other conditions of employment. Accordingly, the Court concluded that it was just as fair and reasonable, under the Act, for the company to insist upon including the clause in any contract as it was for the Union to refuse to do so. In effect, the Court considered that the parties reached a legitimate impasse on the issue." (Board's Petition for Rehearing, page 2.)

6. "The Board's view does not imply, of course, that a labor organization may not lawfully agree for the duration of a contract to waive its right to bargain concerning particular subjects in the area of wages, hours, and working conditions. Nor does it mean that an employer may not lawfully request the Union to agree to such a provision. * * * " (Page 16, Petition for Writ of Certiorari.)

7. The fact (is) that the union could voluntarily have waived its right to bargain about shift schedules and other matters covered by the prerogative clause, and that such a voluntary waiver would have been recognized as valid * * * ". (Page 18, Brief on the Merits.)

8. " * * * the 'prerogative' clause upon which respondent insisted could have been incorporated in the collective bargaining contract by lawful means. * * * " (Page 51, Brief on the Merits.)

9. "It follows that an employer may lawfully in the course of negotiations propose that the union waive a portion of its bargaining rights, * * * " (Page 55, Brief on the Merits.)

of Appeals below so determined upon the substantiality of the record viewed as a whole in favor of the petitioning Company and contrary to the finding of the Board, such determination is entitled to affirmance by this Court upon the specific authority and holdings of this Court in UNIVERSAL CAMERA CORPORATION v. NATIONAL LABOR RELATIONS BOARD, 340 U.S. 474, 71 Sup. Ct. 456, and NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH STEAMSHIP CO., 340 U.S. 498, 71 Sup. Ct. 453, both decided February 26, 1951.

III.

The Court of Appeals below upon its review of the substantiality of the record viewed as a whole, as required of it by the decisions above cited, was amply justified and completely correct in holding that such record, so viewed, does not show "any refusal of the Petitioner to engage in collective bargaining as that term is defined in the Act and in the decisions of the Courts," and in also finding that "the Union continued throughout to be as vigorously opposed to any clause of that kind as the employer was in favor of it. It was not, therefore, as the Board finds, the steadfastness of the employer alone in insisting on its point. It was the steadfastness of the employer and the Union—the one in proposing, the other in opposing a clause of this kind, which the employer felt it ought and the Union felt it ought not to have, which prolonged the negotiations. It was not any general unwillingness on the part of the Petitioner to negotiate a contract satisfactory to itself as well as the Union," and in concluding its Opinion with the finding that "in insisting on the prerogative clause the Company was not guilty of refusing to bargain."

Argument

I.

We direct our attention first to the question of law presented as to whether or not the prerogative clause assailed by the Board is, in and of itself, illegal or in anywise forbidden or prohibited.

In its Opinion, the Court of Appeals below has the following to say:

> "Before the enactment of the National Labor Relations Act, as amended, there was, despite the decisions of the Courts to the contrary, some understandable confusion as to what 'collective borgaining' required of employers. This was due to the persistence of the Board in assenting and pressing its view that the use in the National Labor Relations Act of the words 'collective bargaining' meant that the employer had to agree to terms proposed by the Union, if, in the opinion of the Board, these terms were reasonable and that a failure to agree to such terms was a basis for a finding that the employer was not bargaining in good faith. Since, however, that term has been defined in the National Labor Relations Act as amended, 29 USCA Sec. 158(d), there is no longer any basis for differences of opinion as to what it means, or for Board Orders in effect requiring the employer to contract in a certain way."

One of the earliest "decisions of the Courts to the contrary" was NATIONAL LABOR RELATIONS BOARD v. JONES & LAUGHLIN STEEL CORPORATION, 301 U.S. 1, decided April 12, 1937, the pertinent language in which has been heretofore set forth in Note 1, appearing page 5.

Thereafter, in 1943, MR. JUSTICE JACKSON, speaking for a unanimous Court in TERMINAL RAILWAY ASSOCIATION

OF ST. LOUIS v. BROTHERHOOD OF RAILROAD TRAINMEN, 318 U.S. 1, at page 6, had the following to say:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead, it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those acts is not primarily in the working conditions as such. So far as the act itself is concerned, these conditions may be as bad as the employees will tolerate, or be made as good as they can bargain for. *The Act does not fix, and does not authorize anyone to fix, generally, applicable standards for working conditions.*" (Emphasis supplied.)

In NATIONAL LABOR RELATIONS BOARD v. BELL OIL & GAS CO., (5th Cir.) 91 F. 2d 509, the Court said:

> "'The act does not compel agreements between employers and employees. It does not compel any agreement whatever.' Jones & Laughlin Steel Corporation, supra, 57 S. Ct. 615, 628, 81 L. Ed.—108 A.L.R. 1352. 'The act does not, interfere with the normal exercise of the right of the employer to select its employees or to discharge them. The employer may not, under cover of that right, intimidate or coerce its employees with respect to their self-organization and representation, and, on the other hand, the Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than such intimidation and coercion.' Id., 57 S. Ct. 615, 628, 81 L. Ed.—, 108 A.L.R. 1352.
>
> "To which may be added that the act does not authorize the imposition of penalties, or the making of unreasonable requirements by the Board. Agwilines v. National Labor Relations Board (5th Cir.) 87 F. 2d 146."

In NATIONAL LABOR RELATIONS BOARD v. P. LORILLARD Co., (6th Cir.) 117 F. 2d 921, the Court said:

> "The Board is not authorized, by statute or court decision,' to shape or control the course of the negotiations between employer and employee, so long as the employer bargains collectively, in accordance with the statute. The purpose of the statute is to guarantee to the employees absolute freedom of choice as to their representatives, and that freedom should not be controlled or influenced either by the employer, or by any expression or form of order coming from the Board. Cf. Hamilton-Brown Shoe Co. v. National Labor Relations Board, 8 Cir., 104 F. 2d 49, 54. The Act nowhere attempts to define what agreement shall be offered by the employer or by the union in the bargaining. In fact, as pointed out by the Supreme Court, 'The act does not compel agreements between employers and employees. It does not compel any agreement whatever. It does not prevent the employer "from refusing to make a collective contract and hiring individuals on whatever terms" the employer "may by unilateral action determin." ' National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 45, 57 S. Ct. 615, 628, 81 L. Ed. 893, 108 A.L.R. 1352; National Labor Relations Board v. Sands Mfg. Co., 6 Cir., 96 F. 2d 721, 724, affirmed 306 U.S. 332, 59 S. Ct. 508, 83 L. Ed. 682; National Labor Relations Board v. Sunshine Mining Co., 9 Cir., 110 F. 2d 780. *But if the employer is free to contract or to refuse to contract at will, he is likewise free frankly to state the terms upon which he may yield and those upon which he will not yield.* Collective bargaining requires negotiations by the employer with representatives of the employes, chosen by themselves, freely and without coercion, and has no reference to the terms of the agreement offered so long as the parties negotiate in good faith with the view of reaching an agreement. Each party to the con-

troversy will necessarily offer a unilateral draft of the agreement contemplated, and such action, though it results in shaping the terms finally agreed upon, is in no way illegal. The sincerity of the employer's effort in negotiating with a labor organization, under the statute is to be tested by the length of time involved in the negotiations and the persistence with which the employer offers opportunity for agreement. National Labor Relations Board v. Sands Mfg. Co., supra; National Labor Relations Board v. Sunshine Mining Co., supra. Applying this test, the record does not show that the respondent had a fixed resolve not to enter into an agreement with the union. Cf. National Relations Board v. Highland Park Mfg. Co., 4 Cir., 110 F. 2d 632. Here the respondent at no time refused to receive communications from the union, frequently stated that it would negotiate with the union, and over a period of a year sent numerous communications to the union, explaining its position upon questions affecting the wage scale, physical conditions of the factory, the checkoff, seniority rights, and other conditions of employment. It did not decline to enter into a written contract, (Cf. National Labor Relations Board v. Sunshine Mining Co., supra, 110 F. 2d at page 787), but submitted a written contract. The evidence, without contradiction, shows a sincere attempt on the part of respondent to negotiate with the union, even though, as hereafter shown the respondent labored under the mistaken notion that these negotiations could be carried on by letter. *The Board erred in deciding that the respondent had refused to bargain when it stated in advance certain terms to which it would not accede.*" (Emphasis added.)

In NATIONAL LABOR RELATIONS BOARD v. TOWER HOSIERY MILLS, (4th Cir.) 180 F. 2d 701, JUDGE DOBIE speaking for the Fourth Circuit has seen fit to assure negotiators that,

"The Courts under the Act will never compel an employer to accept a particular contract."

In NATIONAL LABOR RELATIONS BOARD v. WHITTIER MILLS (5th Cir.) 123 F. 2d 725, which opinion was rendered on a petition seeking a contempt order, the Court said:

"Instead of, as the petition claims, the record showing a deliberate and contemptuous refusal to bargain, it shows a painstaking and conciliatory effort on the part of the respondent to reach an agreement, and that the only reason that an agreement was not reached, was because certain things which respondents, in good faith, deemed were necessary to the agreement would not be agreed to by the union, and certain things which the union, also in good faith, deemed necessary to the agreement would not be agreed to by the respondents. In short, the bargaining went on the rocks because each bargainer was endeavoring to get into the agreement the things he wanted, and the union representatives lost patience. In such a situation, it cannot be said that the respondent, in violation of this court's order, refused to bargain. On the contrary, the record shows that the respondents never refused to negotiate but that after respondents refused the checkoff, the representatives of the union broke off the bargaining and refused to negotiate further though the respondents were willing and proposed to continue conferences.

"The law requires good faith bargaining with the purpose of reaching an agreement. It does not require that any particular form of agreement be reached. The respondents did not ask a single thing of the union that it could not, if it wanted to, have agreed to. The same thing is true of the demands the union made upon the respondents. It is not for us to determine whether the proposals of the union or those of the respondents would have been best for the employer and employee. It is sufficient for us to determine that respondents

have not, in contempt of this court's order, failed and refused to bargain. To sustain this petition and issue a contempt order under this record could mean only one thing, in effect, that the respondents were found in contempt for not agreeing to the checkoff, because it was upon this rock that the negotiations finally split. It was because of this that the union broke off and refused to continue negotations. *The law does not authorize the Board or us to make collective bargaining contracts nor to prescribe what shall be written in them.* Neither we nor the Board can interfere in the negotiations as long as they are in good faith, going on." (Emphasis supplied.)

In NATIONAL LABOR RELATIONS BOARD v. ATHENS MFG. Co., (5th Cir.) 161 F. 2d 8, the majority opinion, rendered per curiam, holds that:

"The record leaves in no doubt that respondent was definitely opposed to granting certain demands the Union considered essential in an agreement, and that just as definitely the Union was determined to enforce these demands. If the record showed only this, that is, that respondent was as persistent in standing by what it considered essential in a fair agreement as the Union was in standing to its insistence on what it considered essential, we should, of course, be obliged to hold that this evidence would not support a finding that respondent had refused to bargain collectively."

In the same case, JUDGE WALLER, dissenting, had the following to say:

"I do not believe, and the majority does not hold, that it is given to the National Labor Relations Board, or to the Court, to say what the contract or agreement between the employer and the Union ought to have been, or to adjudge that the failure to maintain the

checkoff of dues, union security, vacation-with-pay and arbitration clauses are unfair labor practices. These things, under present legislation, are matters of negotiation and agreement between the parties, concerning which either party had a legal right to be adamant or contrary, and for the attainment of these objectives the Union had a legal right to strike.

"*Since under the law neither the Board, nor the Court, is authorized to determine what the contract between the respondent and the Union should provide, it seems necessarily to follow that neither the Board nor this Court has a right to impose sanctions upon the respondent for refusing to agree to the demands of the Union as to the things which should have been put in the contract.* Whether the Union was justified in striking or whether the respondent was justified in refusing to agree to the Union's demands are not justiciable issues here. In the absence of a right to decide the question was should only refer it back to the instrumentality of collective bargaining which we can, and should, order to be undertaken in good faith." (Emphasis supplied.)

In FARMERS GRAIN COMPANY v. TOLEDO P & W R.R. (7th Cir.) 148 F. 2d 109, the Court said:

"The court found that the parties did not bargain or negotiate in good faith, and that their failure to agree was the result of the unreasonable and obstinate attitudes of all defendants and their refusal to make concessions. At the close of the trial, however, he said: 'I know that there is an honest disagreement on the part of the management of the railroad company and perhaps an honest—and I know an honest disagreement on the part of the employees of the Brotherhood.' Of course, this statement of the court would not of itself annul its findings of lack of good faith in negotiating and bargaining, but it conclusively shows that

the finding is based solely on the fact that the parties did not reach an agreement, which under the law does not constitute a proper basis for such finding. * * * The law does not require the Brotherhoods or the appellant to enter into an agreement which is not mutually satisfactory. Virginian Railway Co. v. System Federation 300 U.S. 515, 57 S. Ct. 592, 81 L. Ed. 789; N.L.R.B. v. Jones & Laughlin Steel Corp. 301 U.S. 1, 57 S. Ct. 615, 81 L. Ed 893, 108 A.L.R. 1352."

And, on the somewhat narrower proposition as to whether or not either party to a negotiation may lawfully be required to agree to arbitration, this Court, in construing the arbitration provisions of the Railway Labor Act (entirely consistent in such respect with the National Labor Relations Act) in light of the Norris-LaGuardia Act, has said in BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE NO. 27, ET AL. V. TOLEDO P & W R.R., 321 U.S. 50,

"Respondent's final contention, in this phase of the case, is the most insistent. It is that if 'voluntary arbitration,' as the term is used in Section 8, encompasses arbitration under the Railway Labor Act, by that fact the arbitration ceases to be 'voluntary' and the latter Act's requirement that it be so is violated. In short, it is said the effect is to force respondent to submit to compulsory arbitration.

"Without question, as respondent says, arbitration under the Railway Labor Act is voluntary. Section 7, First, requires the machinery to be put in motion by agreement of the parties. A proviso also declares, 'That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this Act or otherwise.' 45 U.S.C., par. 157, First, 45 U.S.C.A. Par. 157, subd. 1. It is clear, therefore, that the Railway Labor Act's purpose is not

to impose upon the parties a legal duty to arbitrate, enforceable as is the duty to bargain collectively imposed by Section 2, Ninth, discussed above. And if the effect of bringing that form of arbitration within the mandate of Section 8 of the Norris-LaGuardia Act were to create such a duty, so enforceable, respondent's contention would be more in point. But it does not do that. And the contention that it does entirely misconceives the effect of Section 7, First, of the Railway Labor Act, and confuses 'violation' of its terms with failure to comply with those of Section 8 of the Norris-LaGuardia Act. The proviso of Section 7, First, and the requirement of submission by agreement were in force substantially in their present form under the Railway Labor Act of 1926. 44 Stat. 582. It was exactly in the light of these provisions and with the intent, as has been shown, to make it include arbitration under the Railway Labor Act that Section 8 used the term 'voluntary arbitration'. Obviously that was no purpose in doing so to contradict the terms of both statutes and label 'voluntary' what in fact is compulsory. Nor was this the effect. Section 7, First, merely provides that failure to arbitrate shall not be construed as a violation of any legal obligation imposed upon the party failing by that Act or otherwise. Respondent's failure or refusal to arbitrate has not violated any obligation imposed upon it, whether by the Railway Labor Act or by the Norris-LaGuardia Act. No one has recourse against it by any legal means on account of this failure. Respondent is free to arbitrate or not, as it chooses. But if it refuses, it loses the legal right to have an injunction issued by a federal court or, to put the matter more accurately, it fails to perfect the right to such relief. This is not compulsory arbitration. It is compulsory choice between the right to decline arbitration and the right to have the aid of equity in a federal court."

After submission of this case to the Court of Appeals

below, this Court as recently as February 26, 1951, in AMALGAMATED ASSOCIATION OF STREET, ELECTRICAL RAILWAY AND MOTOR COACH OF AMERICA, DIVISION 998, ET AL. v. WISCONSIN EMPLOYMENT RELATIONS BOARD, 340 U.S. 383, said the following in respect to compulsory arbitration.

> "In summary, the act substitutes arbitration upon order of the Board for collective bargaining whenever an impasse is reached in the bargaining process. And, to insure conformity with the statutory scheme, Wisconsin denies to utility employees the right to strike.
>
> "* * * We deal only with the question of conflicting federal legislation as we have found that issue dispositive of both cases.
>
> "* * * *
>
> "Upon review of these federal legislative provisions, we held, 339 U.S. at page 457, 70 S. Ct. at page 783:
>
> 'None of these sections can be read as permitting concurrent state regulation of peaceful strikes for higher wages. Congress occupied this field and closed it to state regulation. Plankinton Packing Co. v. Wisconsin Board, 1950, 338 U.S. 953, 70 S. Ct. 491; LaCrosse Telephone Corp. v. Wisconsin Board, 1949, 336 U.S. 18, 69 S. Ct. 379 (93 L. Ed. 463); Bethlehem Steel Co. v. New York Labor Board, 1947, 330 U.S. 767, 67 S. Ct. 1026, 91 L. Ed. 1234; Hill v. State of Florida ex rel. Watson, 1945, 325 U.S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782.'
>
> "* * * *
>
> "In any event, congressional imposition of certain restrictions on petitioners' right to strike, far from supporting the Wisconsin Act, shows that Congress has closed to state regulation the field of peaceful strikes in industries affecting commerce. United Auto Workers v. O'Brien, supra, 339 U.S. at page 457, 70 S. Ct. at page 782. And where, as here, the state seeks to deny

entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law.

"Like the majority strike-vote provision considered in O'Brien, a proposal that the right to strike be denied, together with the substitution of compulsory arbitration in cases of 'public emergencies,' local or national, was before Congress in 1947. This proposal, closely resembling the pattern of the Wisconsin Act, was rejected by Congress as being inconsistent with its policy in respect to enterprises covered by the Federal Act, and not because of any desire to leave the states free to adopt it.

"The utility companies, the State of Wisconsin and other states as *amici* stress the importance of gas and transit service to the local community and urge that predominately local problems are best left to *local* governmental authority for solution. On the other hand, petitioners and the National Labor Relations Board, as *amicus*, argue that prohibition of strikes with reliance upon compulsory arbitration for ultimate solution of labor disputes destroys the free collective bargaining declared by Congress to be the bulwark of the national labor policy. This, it is said, leads to more labor unrest and disruption of service than is now experienced under a system of free collective bargaining accompanied by the right to strike. The very nature of the debatable policy questions raised by these contentions convinces us that they cannot properly be resolved by the Court. In our view, these questions are for legislative determination and have been resolved by Congress adversely to respondents.

"When it amended the Federal Act in 1947, Congress was not only cognizant of the policy questions that have been argued before us in these cases, but it was also well aware of the problems in balancing state-

federal relationships which its 1935 legislation had raised. The legislative history of the 1947 Act refers to the decision of this Court in Bethlehem Steel Co. v. New York Labor Board, 1947, 330 U.S. 767, 67 S. Ct. 1025, 91. L. Ed. 1234, and, in its handling of the problems presented by that case, Congress demonstrated that it knew how to cede jurisdiction to the states. Congress knew full well that its labor legislation 'preempts the field that the act covers insofar as commerce within the meaning of the act is concerned' and demonstrated its ability to spell out with particularity those areas in which it desired state regulation to be operative. This Court, in the exercise of its judicial function, must take the comprehensive and valid federal legislation as enacted and declare invalid state regulation which impinges on that legislation."

The attorneys for the Board in their Petition for Certiorari (page 13) as well as in their Brief on the merits filed herein (pages 16 and 41) have seen fit to refer to the foregoing case apparently because it cites the Board's opinion in the instant case (89 N.L.R.B. 185), as authority for the proposition that problems of work scheduling and shift assignments have been held to be appropriate subjects for collective bargaining under the Federal Act. Far from supporting the Board's contention that the Company has been guilty of refusing to bargain collectively in this case, it seems to us that the net holding of such case simply is that, because the state of Wisconsin undertook by legislation to require compulsory arbitration in lieu of continued collective bargaining, such legislation must be stricken down as unconstitutional because in conflict with the Federal Labor Management Relations Act which neither requires nor permits anyone else to require arbitration as a substitute for collective bargaining. We especially wish to recall this Court's attention to the fact that the Board appeared before it in such case as *amicus*

urging that compulsory arbitration is contrary to the national labor policy as found in the Act.

If the sovereign State of Wisconsin cannot by legislative enactment require arbitration between employer and employee, how then can the Union in this isolated negotiation have required it?

Again, we ask the understanding and indulgence of this Court of our use of the personal in the preparation of this Brief. As the actual negotiators charged from the beginning with the handling of the Company's obligations in respect to its contract negotiation with the Union, we were familiar with the principles of law laid down in the above noted authorities, as well as with the embodiment by Congress of the legal concepts of such decisions in the 1947 amendments to the Act as Sec. 8(d) thereof. We thought we knew why Congress had so amended the Act. This reason we thought to be as expressed by the attorneys for the Board on page 49 of their Brief, as follows:

> "The legislative history of Sec. 8(d) shows that incorporation of the proviso in the amended act was impelled by what Congress believed was the Board's practice in some cases of regarding an employer's failure or refusal to make economic concessions in the course of negotiations as an indication of bad faith."

We were thus in the beginning faced with the necessity of deciding for ourselves whether or not such legal principles and their embodiment as Sec. 8(d) of the Act could now be considered and used as practical guides for our assistance and protection in our negotiations then starting with the Union, or, on the other hand, still would be considered by the Board as mere theory and philosophy by which we must not be guided in such negotiations, except at the risk of Board displeasure and punitive action. We concluded that

such legal principles were intended to be and actually now constituted practical rules for negotiation in which the Board, after the enactment of Sec. 8(d) of the Act would, at least, acquiesce, and we proceeded to govern ourselves accordingly.

Specifically, under the holding of the P. LORILLARD COMPANY case, 117 F. 2d 921, ("But, if the employer is free to contract or refuse to contract at will, he is likewise free frankly to state the terms upon which he may yield and those upon which he will not yield. Collective bargaining requires negotiation by the employer with representatives of the employees chosen by themselves freely and without coercion and has no reference to the terms of the agreement offered, so long as the parties negotiate in good faith with the view of reaching an agreement. Each party to the controversy will necessarily offer a unilateral draft of the agreement contemplated and such action, though it result in shaping the terms finally agreed upon, is in no way illegal. * * * The Board erred in deciding that the respondent had refused to bargain when it stated in advance certain terms to which it would not accede,") we felt that we had a right to frankly state to the Union the terms as to arbitration upon which the Company would not yield. We likewise felt, under the holding of this Court in BROTHERHOOD OF RAILROAD TRAINMEN, ENTERPRISE LODGE 27, ET AL., V. TOLEDO P. & W. R. R., 321 U.S. 50, that the Union, under the Act, could not require the Company to agree in the contract to mandatory arbitration of the decisions of the Company made pursuant to the normal and customary functions of management. And so we then told the Union as early as January 10, 1949, what the views of the Company were on arbitration against arbitration which the Company felt it needed to have in the contract. Almost immediately thereupon the full damage ultimately found by the Board

accrued because the Company's proposals as to arbitration at that time made to the Union were immediately met with an adamant refusal of acceptance on the part of the Union as expressed by Mr. Stafford in his statement that the Union could never agree, even if they were given $500.00 a month increase.

From then on until the actual signing of the contract, the only thing that hampered and delayed final agreement between the parties was this refusal of the Union to agree with the Company as to arbitration. We did not then, nor have we ever for a moment, doubted or questioned the right of the Union to refuse to so agree with us. All we then thought and all we have ever thought was and is that under the law, we too must have a corresponding, correlated right to refuse to agree with them.

The Board's attorneys in their brief to the Court below, as well as in their brief to this Court, have attempted by sheer reiteration, ad infinitum, of their Charge that the Company's attitude of intransigeance constituted the sole stumbling block in the way of agreement between the parties to establish such Charge as a fact in this case. Nothing could be further from the fact. The Union in the beginning placed upon the bargaining table a proposal for arbitration which would have required, amongst other things, the final determination thereby of all promotions and demotions. The Company, being unwilling to concede to such requirement, then placed upon the bargaining table a counterproposal to the effect that there should be no arbitration of its decisions as to matters which it proposed should be recognized and ceded by the Union to the Company as proper functions of management. Between these two proposals there was and remained an obviously unbridgeable gap. Agreement between the parties then became and remained dependent upon the one side or the other receding from its position and conced-

ing to the opposing side. Again, relying on Sec. 8(d), we felt that we had the right to refuse to make such concession, and we so refused. All that happened or failed to happen thereafter was merely the result of actual deadlock between the Company and the Union which then matured and remained in existence. The Company, however, has been found by the Board to have been the sole cause of the delay in reaching agreement, resulting from such deadlock. The Union apparently in the eyes of the Board, and certainly in the eyes of its attorneys, is to be completely absolved from any responsibility therefor.

If ever there was legislation designed and intended to control practical relations and dealings between contracting parties, it is the Act. Certainly under the Act, as the Board's attorneys have consistently admitted, there was a lawful way in which the Company could have sought from the Union agreement to the inclusion of its concept of arbitration in the contract between them. If we in handling the Company's negotiations with the Union have run afoul of the legal requirements of the Act, as claimed by the Board's attorneys, this must be so because we were unable to find or recognize the lawful means which they agree do exist, and if this be so, such lawful means could and would have been found by negotiators other than ourselves. Possibly the attorneys for the Board, had they been in our position as negotiators, would have known what such lawful means were, and would have utilized them. But this, of necessity, means that they must now know what such lawful means would have been and, if they know, they can most certainly now tell this Court and us just what they would have done to stay within their concept of the lawful requirements of the Act. Accordingly, we respectfully suggest to such attorneys that they do so in their presentation of this matter to this Court. Let them envision themselves in the position

in which we found ourselves as negotiators in these contract negotiations, and advise this Court and us just what lawful means they would have then employed to secure agreement with the Union, and, at the same time, protect and safeguard the right of the Company to refuse to accept in the contract the Union's concept or arbitration.

We asked this same thing of the Board's attorney who argued this case to the Court of Appeals below. It must have been that he could not do so, because he certainly made no effort to do so in such presentation. We think the reason for his failure is that he realized that had he been in our position, he would, of necessity, have conducted himself in his negotiations in the same manner as we did. Yet the Board's attorney continues to say that had he done so, he would have violated Sec. 8(a) (1) and (5) of the Act by refusing to bargain collectively in good faith with the Union.

II.

In any event, it seems fundamental that in order for the arguments contained in the Board's brief to have any cogency, or force, it is necessary that the assumed facts of the Company's cupability in the matter upon which they are based must actually exist. The Court of Appeals below, upon its review of the substantiality of the record viewed as a whole, has found that such facts do not exist. We, therefore, respectfully urge that the position taken by the Board's attorneys comes squarely within the impact of the UNIVERSAL CAMERA CORPORATION and PITTSBURGH STEAMSHIP COMPANY cases, although such attorneys have completely failed to take notice of either.

In UNIVERSAL CAMERA CORPORATION v. NATIONAL LABOR RELATIONS BOARD, 340 U.S. 474, 71 S. Ct. 456, decided February 26, 1951, after submission of this case below, this Court has said:

"From the legislative story we have summarized, two concrete conclusions do emerge. One is the identity of aim of the Administrative Procedure Act and the Taft-Hartley Act regarding the proof with which the Labor Board must support a decision. The other is that now Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof.

"It would be mischievous word-playing to find that the scope of review under the Taft-Hartley Act is any different from that under the Administrative Procedure Act. The Senate Committee which reported the review clause of the Taft-Hartley Act expressly indicated that the two standards were to conform in this regard, and the wording of the two Acts is for purposes of judicial administration identical. And so we hold that the standard of proof specifically required of the Labor Board by the Taft-Hartley Act is the same as that to be exacted by courts reviewing every administrative action subject to the Administrative Procedure Act.

"Whether or not it was ever permissible for courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight. This is clearly the significance of the requirement in both statutes that courts consider the whole record. Committee reports and the adoption in the Administrative Procedure Act of the minority views of the Attorney General's Committee demonstrate that to enjoin such a duty on the reviewing court was one of the important purposes of the movement which eventuated in that enactment.

"* * *

"* * * We should fail in our duty to effectuate the will of Congress if we denied recognition to expressed Congressional disapproval of the finality accorded to Labor Board findings by some decisions of this and lower courts, or even of the atmosphere which may have favored those decisions.

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both.

"* * *

"Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied."

Also in NATIONAL LABOR RELATIONS BOARD v. PITTSBURGH STEAMSHIP CO., 340 U.S. 498, 71 S. Ct. 453, decided the same day, this Court has said:

> "Were we called upon to pass on the Board's conclusions in the first instance or to make an independent review of the review by the Court of Appeals, we might well support the Board's conclusion and reject that of the court below. But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court (of appeals) shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * * .' Taft-Hartley Act, Par. 10(e), 61 Stat. 148, 29 U.S.C. (Supp. III) par. 160 (e), 29 U.S.C.A. Par. 160 (e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.' Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712; Revised Rules of the Supreme Court of the United States, Rule 38, subd. 5, 28 U.S.C.A. The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.
>
> "This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way. It is not for us to invite re-

> view by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situation we should 'adhere to the usual rule of non-interference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Comm'n. v. American Tobacco Co., 274 U.S. 543, 47 S. Ct. 663, 71 L. Ed. 1193."

Perhaps then, the most important question here presented is whether or not this Court is prepared to find that this is one of the "rare instances where the standard appears to have been misapprehended or grossly applied" by the Court of Appeals below, or prepared to now decide contrary to its holding in the PITTSBURGH STEAMSHIP COMPANY case that this Court, rather than the Court of Appeals below, is the proper place to review a conflict of evidence and to reverse such Court below because this Court, had it been in the place of such Court below, would have found the record tilting in the opposite direction, although fair-minded judges could find it tilting either way.

The decision in this case is not "of importance to the public" but is rather of importance only to the opposing parties herein because it necessarily depends upon determination of the fact question of whether or not the Company did condition its entire negotiation with the Union, as well as its execution of any contract, upon the Union's prior acceptance of the Company's entirely lawful concept of arbitration in such contract. This is what the Board's attorneys assert to this Court happened, and this is what they very obviously desire this Court to tell the Company it may not again do in its future negotiations with the Union. The final decision in this case will govern only future negotiations between the

Company and the Union. It will not govern, generally, negotiations between other employers and employees for the reason that the facts of such other negotiations will, of necessity, be different from the facts of this one.

Nor is there here present "a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals." The Board, in its Petition for Certiorari, asserted the existence of such conflict between the opinion of the Court of Appeals below in the instant case and the opinions in McQUAY-NORRIS MFG. CO. v. NATIONAL LABOR RELATIONS BOARD, (7th Cir.) 116 F. 2d 748; HARTSELL MILLS v. NATIONAL LABOR RELATIONS BOARD (4th Cir.) 111 F. 2d 291; NATIONAL LABOR RELATIONS BOARD v. REED & PRINCE MFG. CO., (1st Cir.) 118 F. 2d 874; and RICHFIELD OIL CORPORATION v. NATIONAL LABOR RELATIONS BOARD. (9th Cir.) 143 F. 2d 860.

We must confess ourselves unable to find any such conflicts.

The specific determination in the McQUAY-NORRIS MFG. Co. case, supra, was that the employer refused to grant full recognition to the Union as the sole and exclusive bargaining agent for all of its employees, but, instead, actually bargained with the Union solely as the representative of only such of its employees as were members of the Union. The Court said,

> "We, therefore, conclude that Petitioner refused to grant recognition as the Act commands, and that its refusal constitutes an unfair labor practice as charged in the Complaint and found by the Board."

The specific determination in the HARTSELL MILLS case, supra, likewise has to do with recognition. There the Court said,

> "There was evidence that Petitioner took the position in dealing with the Union that it would recognize the right of the Union to represent only employees who were members of that organization and no other. This was not in compliance with the Act, Sec. 9(a) of which provides that an organization representing a majority shall bargain for all of the employees."

In the REED & PRINCE MFG. CO. case, supra, the specific determination was that the employer violated the Act by refusing to continue to negotiate with the Union after the occurrence and during the existence of a strike by the Union. The Court, after having specifically noticed that the Board had not held the employer guilty of any unfair labor practice prior to the actual initiation of the strike, found that,

> "The Act expressly leaves the right to strike unaffected and any remedies the employees had were not destroyed by remaining on strike. If, after May 25th (upon which date the strike started) the respondent refused to bargain with the Union, it violated Section 8(5) of the Act and is subject to such orders of the Board as will effectuate the policies of the Act."

The Court further said:

> "The strike not having been provoked by any antecedent unfair labor practice, the employer could have proceeded to fill the places of strikers with other men * * * The employer did not do this, however, but continued to treat the strikers as its employees and exerted itself to stampede the employees back to work * * * In these circumstances we find nothing in the Act which relieves the employer from the obligation to bargain collectively with its employees through their chosen representative."

In the RICHFIELD OIL CORPORATION case, supra, the specific determination was that the employer had violated the Act by refusing to permit access to its ships to the walking delegates of the Union for the purpose of talking to the crew members for which the Union was bargaining. The right to such access had been recognized by the employer in its prior contract with the Union, and the Board had held that such access to the principals for which it was negotiating was necessary in order to enable the Union to intelligently carry on such negotiations. The Court said,

> "We do not find that there was any general attitude or conduct on the owner's part to violate the provisions of the Act. It was a mistake of law in its assumption that the right to such access and the passes facilitating it was one acquired by bargaining instead of the Act itself."

In none of such cases was there any question raised before the reviewing Court as to the correctness of the factual determinations upon which the Board had based its decision and order and in none of them did the reviewing Court in any manner question the correctness of such factual findings of the Board on review of the substantiality of the record viewed as a whole.

In the instant case, however, the entire factual basis upon which the Board's Decision and Order was grounded has been cut out from under it by the reviewing Court. Such factual basis must, of necessity, somehow be restored as the ground upon which the Board's finding in this case must stand if it is to be reinstated by reversal of the contrary fact findings of the Court of Appeals below.

Again, we say that reversal by this Court of the fact determinations of the reviewing Court below would necessitate substitution by this Court of its judgment for that

of the Court of Appeals below, which this Court, in the UNIVERSAL CAMERA CORPORATION case, supra, has said that it will do only in the "rare instance where the standard appears to have been misapprehended or grossly misapplied."

III.

We now pass to some consideration of the substantiality of the record viewed as a whole upon which the Court of Appeals below has found contrary to the Board on the facts.

It is abundantly obvious that the Trial Examiner suspected the Company of being "anti-union". Upon what he based such suspicion we do not know, unless upon the wholly gratuitous and entirely groundless insinuations and innuendoes cast by counsel for the Board with which the record before him is replete. In his Intermediate Report he said:

> "I am persuaded to the conclusion that respondent never sincerely intended to bargain with the Union, but, on the contrary was determined at the outset of negotiations to agree to nothing that would serve in any respect to enhance the Union's prestige or make it appear to the employees as an effective bargaining agency." (R. Vol. I, page 101.)

And further:

> "I find that Respondent entered into its meetings determined not to reach agreement on any matter or terms which the Union could hold forth to the employees as an accomplishment; that by this conduct respondent expected to discredit the Union as a bargaining agent and to discourage others from 'digging down' into their pockets to join an organization which demonstrably had been unable to gain for employees any 'real advantage of value' ". (R. Vol. I, page 102.)

Upon what facts before him was he so persuaded or did he so find? Again we say, nothing but suspicion, and, possibly, the inevitable result then before him that because as yet there was no agreement between the Company and the Union, there was also no completed contract between them. We are persuaded that had such contract actually been signed, as it later was, at the time the Trial Examiner determined upon his Intermediate Report, he would have, of necessity, therein exonerated the Company from refusal to bargain collectively in good faith, and that an analysis of such Intermediate Report appended to the Board's Decision and Order and appearing beginning R. Vol. I, page 91, will inevitably lead to such conclusion. This because, while he therein correctly conceives and states the applicable principles of law, he nevertheless misapplies same to the factual situation before him, and ends up with an Intermediate Report that confounds and refutes its own conclusions, and, in the language of the Fifth Circuit Court of Appeals in NATIONAL LABOR RELATIONS BOARD v. FULTON BAG AND COTTON MILLS, 175 F. 2d 675, "deals not with resolving conflicts in testimony, but with assigning motives and reasons for actions taken on facts as to which there is no substantial conflict."

Nevertheless, the Board though rejecting the law, as found and applied by the Trial Examiner, did adopt his such unsubstantiated findings of fact. Wherefore, the Board's own Decision and Order remains itself based upon the suspicion which pervaded the Intermediate Report.

The true fact is that except for fair and rightful expression of its honest conviction that the Union was not for the best interest of its employees made before the election and its insistence upon its lawful bargaining rights thereafter, the Company has not evidenced any "anti-union" attitude whatever, but, on the contrary, has maintained and

ing 20 hours or more per week, Company will, upon proper showing from such employee, grant to such employee three (3) working days leave with pay on the basis of the number of hours each day regularly worked. Part-time employees, regularly working less than 20 hours per week shall have no benefits under this section.

ARTICLE X.

DISCRIMINATION AND UNION ACTIVITY

Section 1: The Company agrees that it will not interfere with, restrain, or coerce employees because of membership or lawful activity in the Union, nor will it, by discrimination in respect to hire, tenure of employment or any term or condition of employment, attempt to discourage membership in the Union.

Section 2. The Union agrees that neither the Union nor its members will intimidate or coerce the employees in respect to their right to work and will not attempt to force Union activity or membership on such employees. The Union further agrees that there shall be no solicitation of employees for Union membership on Company time. The Union shall not discriminate in any way as to the admission to or membership in the Union, or otherwise, against any persons who are now, or hereafter may be, employed or be restored to or reinstated in employment by the Company, provided such persons meet the requirements of the Union constitution and by-laws as to eligibility for membership.

Section 3: Both the Company and the Union recognize that neither membership nor non-membership in the Union is a requirement for the obtaining or retaining of employment with the Company.

Section 4: The Company agrees to honor such monthly dues deduction authorization as may be hereafter executed by employees within the bargaining unit in favor of the Union, it being understood that the Company assumes no responsibility for the legality of such authorizations, and it

furnishes the Company with satisfactory evidence or medical certificate of such fact, the Company will then grant such additional sick leave as may be consistent with the nature of the continuing disabling illness or accident, not exceeding additional periods of thirty (30) days each.

Section 4: An employee who becomes ill or disabled and is unable to work and makes proper report of his illness or disability to the Company will, upon approval by the Company, receive sick leave with pay as follows:

(a) During the first three (3) months of service—no paid sick leave.

(b) During remainder of calendar year, pro-rata sick leave as follows:

9 months	10 days
8 months	9 days
7 months	8 days
6 months	7 days
5 months	6 days
4 months	5 days
3 months	4 days
2 months	3 days
1 month	2 days

(c) Every calendar year thereafter—10 days.

The Company retains the right to require satisfactory evidence or medical certificate to prove ability or inability to work.

Employees who work regularly 20 hours or more per week are considered full time employees and shall be entitled to paid sick leave benefits as provided above, on the basis of the number of hours each day regularly worked. Employees who regularly work less than 20 hours per week are considered part time employees and are not eligible for any paid sick leave.

Section 5: In the event of the death of a member of the immediate family of a full time employee, regularly work-

sence for such employees as may be delegated by the Union to attend State and National conventions; provided, that the aggregate of such leaves shall not exceed four (4) persons in number and three (3) weeks in length. Within these limits the Union may use such leaves of absence as it sees fit; provided, that no more than two (2) employees of the Company shall be absent upon such leaves at the same time. The Union is required to give one week's advance written notice of the identity of the employees for whom such leaves of absence are desired, and seniority in respect to promotions and in respect to choice of vacation dates as to such employees shall not be affected by such leave of absence.

Section 3: Leave of absence shall be understood to mean an absence from work without pay, requested by an employee and consented to by the Company in advance, for an agreed period of time and for good cause. Any absence from work on the part of an employee without such prior agreement and consent by the Company, or his failure to report to work at the end of such leave, may, at the option of the Company, be treated as a "quitting" on the part of such employee.

Requests for leave of absence must be submitted by the employee to the Department Manager. The Company retains the exclusive right to approve or disapprove requests for leave of absence. Seniority will not accumulate during a leave of absence granted for reasons other than disabling illness or accident of the employee.

In the event of disabling illness or accident, the employee is requested to inform the Department Manager by 9:00 o'clock A.M. of the first day of absence for such cause in order to prevent possible termination of employment. Sick leave will then be allowed automatically for a period of time consistent with the nature of disabling illness or accident, but not exceeding thirty (30) days. The Company maintains the right to require satisfactory evidence or medical certificate to prove inability to work. If, at the end of the automatic sick leave provided above, the employee is still unable to work because of disabling illness or accident and

(a) Sickness or injury, proved by a physicians' certificate or absence due to sickness when excused by an authorized representative of the company of a combined duration not exceeding six (6) weeks during first year of employment or two (2) months after one (1) year of employment.
(b) Jury duty or compulsory appearance in court.
(c) Vacations in accordance with the provisions of this Section.
(d) Leave of absence of two (2) weeks or less during any one year.
(e) Leave of absence of three (3) days for death in immediate family.

Leave of absence in excess of two (2) weeks for reason other than disabling illness or accident will reduce vacation rights by one-half (½) day for each such excess two (2) weeks of absence. Leave of absence due to sickness, injury, or accident in excess of the period stipulated in part (a) above will reduce vacation right at the option of the Company by one (1) day for each additional month of absence. The Company's record in respect to last employment date and continuous service shall be conclusive.

Vacations will be assigned by the Department Manager and insofar as possible, consideration will be given to the employee's selection of the vacation time. Employees with seniority will have first choice for vacation dates, which choice will be granted provided the operating efficiency of the Company is not, in its opinion, thereby impaired, but the Department Manager shall not be required to consider seniority for the second week of vacation if an employee desires to split the vacation, or if after selection is made, a change in schedule is desired.

The Company reserves the right to schedule vacations in accordance with the conditions and requirements assuring uninterrupted operating service.

Section 2: During the life of this agreement, the Company agrees, during each calendar year, to grant leaves of ab-

started in December of the previous calendar year receive 2 weeks vacation with pay upon completion of eleven months of continuous service.

Employees whose last date of continuous employment began earlier than in the preceding calendar year receive two (2) weeks vacation with pay which may be taken any time in the applicable calendar year during the vacation period stated above.

An additional day of vacation is allowed in lieu of a paid holiday within a vacation period. Vacations must be taken in periods of not less than five (5) consecutive working days.

No more than two weeks of paid vacation is allowed during any one calendar year. Vacations are not cumulative from year to year.

Pay in lieu of vacation will be allowed upon termination of employment to employees whose date of continuous employment began earlier than in the preceding calendar year, provided the employee has given advance notice of at least two full weeks of his intention to terminate his employment and such termination of employment is effective after March 31st of the current year.

However, any vacation right that has been earned by employees whose continuous employment began in the preceding calendar year will be paid in lieu of vacation if termination of services occurs before the vacation has been taken.

No pro-rata vacation rights will accrue at any time and any vacation rights which a continuation of services might have secured will cease upon termination from the company's services.

"Continuous Service" when used in determining vacation rights shall mean the period of uninterrupted employment from the date of last employment. The following interruptions resulting in absence from work shall not have detrimental effect upon the employee's "continuous service" record and shall be considered as time worked for the purpose of this section which is devoted exclusively to vacations:

pay for such days at the regular rate.

New Year's Day
Fourth of July
Labor Day
Thanksgiving Day
Christmas Day
The afternoon of Christmas Eve
The afternoon of New Year's Eve

and if any such day (other than Christmas Eve or New Year's Eve) falls on a Sunday, then the following Monday shall be observed as the Holiday.

In the event Christmas Eve and New Year's Eve fall on either a Saturday or a Sunday, the afternoon of the preceding Friday shall be observed as such half-holidays.

Section 6: Employees of this Company shall be paid at the regular rate for scheduled working time lost from employment with this Company on account of jury service.

ARTICLE IX.

VACATIONS AND LEAVE

Section 1: Vacations with pay are granted after continuous full time service of one year. No vacations are granted to part time employees with less than twenty (20) hours of service per week. Employees with 20 hours or more per week of continuous service for one year or more shall be granted vacation credits on the basis of the number of hours each day regularly worked.

No vacation as provided in this article may be taken except during the period beginning April 1st and ending November 30th in any calendar year.

Employees whose last date of continuous employment began in the preceding calendar year receive 2 weeks vacation with pay upon completion of the first year of continuous service; except that employees whose continuous service

ARTICLE VII.

WORK DAY AND WORK WEEK

The established work week shall consist of five consecutive days beginning on Monday, and the normal work day shall be eight hours of work which shall be consecutive except for a lunch period of one hour or less.

ARTICLE VIII.

WAGES

Section 1: Commencing with the pay period August 20, 1951, employees within the Classifications B, C, D & E shall receive a wage increase of ten percentum (10%) of their wages as of the date of this contract, less all increases, other than promotion increases to the next higher job classification, received since January 1, 1951.

Section 2: The Company shall pay the employees covered by this agreement wages in accordance with Exhibit "A" attached hereto and made a part hereof (hereinafter called the "regular rate").

Section 3: For work performed not in excess of forty (40) hours per work week, the Company shall pay wages at the regular rate.

Section 4: For any work performed in excess of forty hours per work week, the Company shall pay wages at one and one-half times the regular rate. When overtime work is required in any department or section thereof such overtime work shall be offered among the employees of such department or section thereof equally, provided, however, that the Company reserves the right to put other employees of its own choosing on such work if, in the opinion of the Company, such act becomes necessary.

Section 5: Any employee required to work on the following days shall receive pay at the rate of two times the regular rate, and if not required to work on such days, shall receive

the length of uninterrupted employment with the Company commencing with the latest date of hiring. For the purpose of promotions, seniority shall be based upon length of continuous service in the applicable job classification. The Company's record in respect to last employment date and length of service on each job classification shall be conclusive.

New employees and those hired after a break in continuity of service will be regarded as probationary employees for the first three (3) months of actual employment and will receive no continuous service credit during such period. At the end of the probationary period the employee's seniority shall be retroactive to the date of hire.

An employee who leaves the employ of the Company as a result of his induction into the Armed Forces of the United States, shall upon reinstatement on the Company's active payroll be given continuous service credit for the time served in the Armed Forces. Continuous service credit shall discontinue upon voluntary re-enlistment in the Armed Services. It is understood that the Company shall reinstate as required by law, employees who left their positions upon induction into the Armed Forces of the United States.

Where a "Temporary employee" or a "Part-time employee" is permanently employed on full time, the aggregate of his temporary or part-time period shall not be added to his period of regular employment in determining length of service, but his service shall date from the beginning of his most recent full time employment.

"Continuous Service Credit" shall be broken and seniority lost by the quitting, or discharge, or by the involuntary lay-off of an employee for a period of twelve months. Any employee hired for a previously agreed to limited period of time, or for the specific duration of a previously specified job assignment breaks continuous service and loses seniority upon completion of that period or assignment.

chairman, and he shall hear only such evidence and arguments as previously presented at such meetings. Said impartial chairman shall have the right to make recommendations and suggestions to both sides, but shall not have the power to vote, and neither side shall be obligated to accept his recommendations or suggestions. The cost of such impartial chairman shall be borne equally by both the Company and the Union.

Where the service record, physical fitness, application, ability to perform the duties of a higher position, skill and efficiency of the employees recommended for promotion or demotion are relatively equal, seniority as outlined and defined in the succeeding article numbered VI hereof will be considered as the controlling factor in the approval or disapproval of such promotions and demotions.

ARTICLE V.

DISCHARGE OF EMPLOYEES

Section 1: The Company agrees that upon discharge of any employee, upon demand from such employee, it will furnish to such employee a written statement as to the reason or reasons for discharge, and that such discharged employee may present as a grievance, under the machinery hereinafter provided, his dissatisfaction with such discharge. If the final determination of such grievance is that such discharged employee was unjustly discharged, such employee shall be reinstated immediately to his former position without loss of seniority rank and shall be entitled to compensation for time actually lost in each work week at his regular rate of pay.

Section 2: An employee who resigns or is laid off because of lack of work will, upon his request, be furnished with a statement by the Company as to the character of his service with the Company.

ARTICLE VI.

SENIORITY

Seniority shall be defined as the length of service since the last date of hiring. Length of service with the Company is

of the Union may, within five (5) days from receipt of such decision of the Company's Secretary above provided, request in writing, addressed to the Company's Secretary, a review of such decision by a committee hereinafter provided.

Such committee to review such decisions on promotions and demotions shall be set up and continued in existence throughout the term of this contract, consisting of two (2) members designated by the Company and two (2) members designated by the Union, which Union designated members shall be employees of the Company within the bargaining unit. One of the company designated representatives shall act as chairman of the committee. All decisions of the committee shall be made by majority vote. Such voting shall be by secret ballot, each member of the committee being entitled to one vote only. The Union shall be entitled to have present, in an advisory capacity only, at such meetings, its local business representative, and an international representative, who shall be entitled to participate in the discussions, but shall not be entitled to any vote. In addition, there shall be present the department manager and union steward of the department involving the person in question, who both shall be entitled to participate in the discussions, but shall not be entitled to any vote. All decisions of such committee so reached by majority vote shall be recorded in minutes to be kept of such committee's meetings and shall be final and binding upon both the Union and the Company. Union shall be furnished with a copy of such minutes. In the event of a tie vote, the company's decisions with respect to such promotion or demotion shall stand. However, if the Union is still dissatisfied with such promotion or demotion, it shall have the right, within five (5) days from the date of the meeting of the committee at which the tie vote occurred, to request a United States District Judge for the Southern District of Texas (the appointing Judge to be rotated in order of seniority) to appoint an impartial chairman to meet with the committee above mentioned, at a time and place convenient to all. Such appointed, impartial chairman shall replace the representative who previously acted as

The right to select and hire, to discharge, or discipline for cause, and to maintain discipline and efficiency of employees, and to determine the schedules of work is recognized by both Union and Company as the proper responsibility and prerogative of management, to be held and exercised by the Company in a fair and just manner, and while it is agreed that an employee, feeling himself to have been aggrieved by any decision of the Company in respect to such matters, or the Union in his behalf, shall have the right to have such decision reviewed by top management officials of the Company under the grievance machinery hereinafter set forth, it is further agreed that the final decision of the Company made by such top management officials shall not be further reviewable by arbitration.

ARTICLE IV.

PROMOTIONS AND DEMOTIONS

For the purpose of this article, the term "promotion" means the elevation of an employee from one lettered classification in the attached wage promotion plan to the next higher lettered classification, and the term "demotion" means the lowering of an employee from one lettered classification in such attached wage promotion plan to the next lower lettered classification.

All promotions and demotions shall be forthwith made by the Company at its will, giving the business representative of the Union prompt notice thereof. Any employee feeling himself to have been aggrieved by the decision of the Company in respect to any promotion or demotion, or the Union in his behalf, shall have the right to file his or its dissatisfaction with such decision as a grievance under the grievance machinery hereinafter set forth, but not including arbitration.

If, upon receipt of the decision of the Company's Secretary provided for in Section 5(c) of Article XII of this Contract, the employee, or the Union in his behalf, shall be dissatisfied with such decision, the business representative

ARTICLE II.

BARGAINING

Section 1: The Company, through its appointed representatives, will recognize the bona fide representatives of Office Employees International Union, Local No. 27, as the exclusive representative of all the said employees at its Home Office in Galveston, Texas, for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, and other conditions of employment.

Section 2: The Company will, pursuant to the provisions hereinafter contained, governing "grievances" provide for the handling on the Company's part of such disputes or disagreements as to interpretation and administration under the contract, presented as grievances, as shall arise during the term of the contract.

Section 3: The business representative of the Union shall have access only to the office of such representatives of the Company as shall be designated to receive him for the purpose of presenting grievances to such representative. It is, of course, agreed that the Union will keep the Company advised as to the identity of its business representative and that the Company will keep the Union advised as to the identity of the Company representative designated to discuss such matters with him.

ARTICLE III.

FUNCTIONS AND PREROGATIVES OF MANAGEMENT

Nothing in this agreement shall be deemed to limit or restrict the Company in any way in the exercise of the customary functions of management, including the right to make such rules not inconsistent with the terms of this agreement relating to its operation as it shall deem advisable, and the right to hire, suspend, discharge, or otherwise discipline an employee for violation of such rules or for other proper and just cause.

APPENDIX A

ARTICLES OF AGREEMENT

BETWEEN

AMERICAN NATIONAL INSURANCE COMPANY

AND

OFFICE EMPLOYEES INTERNATIONAL UNION, LOCAL NUMBER 27

OF THE

AMERICAN FEDERATION OF LABOR

This agreement is made by and between the American National Insurance Company, hereinafter referred to as the Company, and the Office Employees International Union, Local No. 27, hereinafter referred to as the Union.

The contracting parties desire that a maximum of well-being, contentment, and good will should result from the friendly deliberation on and fair disposition of all problems arising in the management-employee relationship, to the end that maximum efficiency may be maintained.

ARTICLE I.

RECOGNITION

The Company recognizes the Union as the sole collective bargaining representative for all employees in the Home Office of the Company at Galveston, Texas, but excluding guards, secretaries to department heads and executives, agents, building and maintenance employees, professional employees, department heads and all other supervisors as defined in the Labor-Management Act.

wrought. National Labor Relations Board v. Thompson Products, Inc. (6 Cir.), 97 F. (2d) 13, 15."

Conclusion

It is respectfully submitted that the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit, to which this certiorari is directed, is, in law and on the facts of the case, entitled to and should be, by this Honorable Court, affirmed, and Respondent, American National Insurance Company, respectfully so prays.

M. L. Cook,
A Member of the Bar of the Supreme Court of the United States,
Attorney for Respondent,
AMERICAN NATIONAL INSURANCE COMPANY,
Cotton Exchange Bldg.,
Galveston, Texas;

Louis J. Dibrell,

Chas. G. Dibrell, Jr.,
Of the Firm of Dibrell, Dibrell & Greer,
Attorneys for Respondent,
AMERICAN NATIONAL INSURANCE COMPANY,
Medical Arts Bldg.,
Galveston, Texas

U.S.C.A. Par. 160 (e), which provides that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive.' But the courts have not construed this language as compelling the acceptance of findings arrived at by accepting part of the evidence and totally disregarding other convincing evidence.

" 'We are bound by the Board's findings of fact as to matters within its jurisdiction, where the findings are supported by substantial evidence; but we are not bound by findings which are not so supported. 29 U.S.C.A. Par. 160 (e) (f); Washington, Virginia & Maryland Coach Co. v. National Labor Relations Board, 301 U.S. 142, 57 S. Ct. 648, 650, 81 L. Ed. 965. * * * Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; and the test is not satisfied by evidence which merely creates a suspicion or which amounts to no more than a scintilla or which gives equal support to inconsistent inferences. Cf. Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F. (2d) 985, 989.

" 'Substantial evidence' means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences and deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

"The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be

displayed that completely neutral attitude which it understands is required of it both by law and common sense. During the many months covering the Company's dealing with the Union from the date the organizational campaign was originally started down to the time of the Hearing before the Trial Examiner and even since that time, the Company has been accused of but one discriminatory discharge of an employee within the unit consisting of more than 700 people and as to that accusation the Company was absolved by the Trial Examiner. Of the 100 or more supervisory and executive employees of the Company in position to attempt coercion of its other employees, only one has ever been accused by the Union, much less found guilty, of such conduct and that occurrence was prior to the election. The responsible heads of the Company have made every effort to insure that the organizational rights of its employees were scrupulously observed and the Company's negotiators have to the best of their ability attempted likewise to scrupulously observe all lawful requirements of the Act in their bargaining with the Union. Upon what factual basis then does the suspicion of anti-unionism pervading the Intermediate Report and the Decision and Order arise, and, in any event, is suspicion ever a lawful justification for a factual finding?

Long before the 1947 amendment to the Act, JUDGE GARRECHT, speaking for the 10th Circuit Court in NATIONAL LABOR RELATIONS BOARD v. UNION PACIFIC STAGES, 99 F. 2d 153, at page 177, had the following to say as to the substantiality of the evidence required to support Board Findings of Fact.

> "It is suggested that this court should accept the findings of the Board; that contradictions, inconsistencies, and erroneous inferences are immune from criticism or attack by Section 10(e) of the Act, 49 Stat. 453, 29

being understood further that nothing herein shall ever be construed as requiring any employee to execute such authorization or continue membership in the Union as a condition of employment.

ARTICLE XI.

STRIKES AND LOCKOUTS

There shall be no strikes, slow-downs or work stoppages of any kind during the life of this agreement, and there shall be no lockout of employees by the Company during said term.

ARTICLE XII.

GRIEVANCES

Section 1: The Union may designate for each department a Union steward who may call to the attention of his department head any question of employment conditions that shall arise in the department. Discussions between Union Steward and department head shall be at such time and place as not to interfere with work in the department.

Section 2: The Union agrees to designate and to keep the Company advised of the identity of a steward for each department. It is agreed that the steward for each department so designated shall confine his or her activities to his own department.

Section 3: Any employee or group of employees who believes that he or they have a justifiable request or complaint, shall discuss the request or complaint with his or her immediate superior in an effort to settle same, and in such discussion such employee or group of employees may have the assistance of the steward in the department in which such request or complaint arises.

Section 4: Definition of Grievance. "Grievance" as used in this agreement is limited to a complaint which has not been settled as a result of the discussion required in Section 3 hereof, or which involves the interpretation or application of, or compliance with, the provisions of this agreement.

Section 5: Grievance Procedure.

(a) A grievance which has not been settled within 5 days as a result of the discussion required in Section 3 hereof, to be considered further must be filed promptly in writing with the employee's Assistant Department Head stating fully the nature of the grievance and the grounds for complaint or dissatisfaction. The Assistant Department Head shall answer the grievance within 5 days from date of presentation in writing, signing and dating his reply and returning one copy thereof to the employee or the steward. If the Assistant Department Head's decision is not appealed within 5 days, the grievance shall be considered on the basis of the decision made and shall not be eligible for further appeal.

(b) In order for a grievance to be considered further, it shall be appealed in writing to the Department Manager within 5 days from the date of the Assistant Department Head's written reply. An appealed grievance shall be discussed in an attempt of settlement at a mutually convenient time between the steward or employee and the Department Manager, and answered within 5 days from appeal. The Department Manager's decision, in writing, after signing and dating it, shall be given to the steward or employee. If the Department Manager's decision is not appealed within 5 days, the grievance shall be considered settled on the basis of the decision made and shall not be eligible for further appeal.

(c) In order for a grievance to be considered further, written notice of appeal by the business representative of the Union shall be served to the Company's Secretary, or his delegated representative, within 5 days of the date of the Department Manager's written decision. Discussion of the appealed grievance shall take place at the earliest date of mutual convenience following receipt of the notice of appeal, but not later than ten (10) days after notice is received by the Company's Secretary, or his delegated representative unless by mutual agreement a different date for disposition is agreed upon.

Grievances discussed in such meetings shall be answered in writing by the representative of the Company within 10 days after the date of such meeting; unless by mutual agreement a different date for disposition is agreed upon. Whenever either party concludes that further meetings can not contribute to the settlement of the grievance, the dissatisfied party may, by written notice within 10 days from the date of the written decision of the last previous meeting, appeal the grievance to arbitration, provided the grievance is subject to review by arbitration under the term of this contract.

Section 6: If either party shall elect to submit a grievance to arbitration, it shall give written notice to the other party of intention to arbitrate. Such notice shall contain a statement specifying the grievance. Upon receipt of any such notice, the parties shall, at the earliest date of mutual convenience, confer in an effort to select by mutual consent, an impartial board of arbitration.

The board of arbitration shall consist of one arbitrator appointed by the Union and another by the Company, and a third appointed by the first two arbitrators. In the event that the first two arbitrators are unable, within 10 calendar days, to agree on the appointment of the third arbitrator, such third arbitrator shall be appointed by one of the United States District Judges for the Southern District of Texas, such appointing Judge to be rotated in order of seniority.

The expense incident to the appointment and services of the third arbitrator shall be borne equally by the Union and the Company.

Section 7: Nothing in this Article shall be construed to deprive any individual employee or group of employees of their right at any time to present grievances to the Company or to have such grievances adjusted without the intervention of the Union, as long as the adjustment shall not be inconsistent with the terms of this contract, and provided the Union is given notice and opportunity to be present at such adjustment.

Section 8: Whenever the word "day" or "days" is used in this Article XII, it shall mean working days, that is to say, Monday through Friday of each week.

ARTICLE XIII.

It is agreed that the Union shall be furnished space for the posting of proper notices, the location and area of such space to be agreed upon between the Company and the Union.

ARTICLE XIV.

CONDITIONS

This agreement is subject to the provisions of existing laws, regulations, applicable Executive Orders, and other orders of duly constituted authorities of the United States and the State of Texas, which are now and may hereafter be in force during the term of this agreement.

ARTICLE XV.

PENSION PLAN

The Pension Plan and Group Insurance Benefits offered by the Company to the Employees are hereby ratified and approved by the Union.

ARTICLE XVI.

TERM

This agreement shall remain in full force and effect until August 10, 1953, and provided that unless one party shall give written notice to the contrary to the other party not later than sixty (60) days prior to such expiration date, this agreement shall be automatically renewed for a period of one year from such expiration date. Unless similar notice be given by one party to the other such agreement as so renewed shall be automatically renewed for another period of one year.

In the event the adjusted Series Consumers Price Index (B.L.S. Cost of Living Index) increases from 185.2 on June 15, 1951, to 200.2 on June 15, 1952, this contract may be reopened by the Union on August 10, 1952, for the purpose of negotiating wages only; provided, the Union shall give written notice to the Company of its desire to so reopen at least thirty (30) days prior to August 10, 1952.

IN WITNESS WHEREOF, the parties hereto have executed this agreement this 10th day of August, 1951.

AMERICAN NATIONAL
INSURANCE COMPANY
By: L. Mosele
Secretary-Comptroller

OFFICE EMPLOYEES -
INTERNATIONAL UNION
LOCAL NO. 27, A. F. OF L.

Emily Moses
Olga Perez
Shirley Dial
L. J. Gallagher

ANICO WAGE PROMOTION PLAN

Job Class	Starting Salary	3 Mos	6 Mos	12 Mos	1½ Yrs	2 Yrs	2½ Yrs	3 Yrs	3½ Yrs	4 Yrs	4½ Yrs	5 Yrs	6 Yrs	7 Yrs	8 Yrs	9 Yrs	10 Yrs	11 Yrs
A	$130																	
B	130	135	140	145	150	155		160		165								
C	140	145	150	155	160	165		170		175		180	185	190				
D	160		165	170	175	180	185	190	195	200	205	210	220	230	240	250	260	270
E	190		200	210	220	230		240		250		260	270	280	290	300	310	320

Merit Rating Score Necessary for Salary Increases

In addition to the required length of service shown in the wage promotion plan, LOMA Standard merit rating scores as indicated below are necessary in order to qualify for the salary increases under the Wage Promotion Plan:

Job Classification	*If Salary is:*	*Merit Rating Score required to qualify for next higher wage bracket*
B	$130.00	Automatic
B	135.00	Average
B	140.00	Slightly above average
B	145.00	Moderately above average
B	150.00	Considerably above average
C	140.00	Automatic
C	145.00	Average
C	150.00	Average
C	155.00	Slightly above average
C	160.00	Slightly above average
C	165.00	Moderately above average
C	170.00	Considerable above average
D	160.00	Slightly below average
D	175.00	Average
D	190.00	Slightly above average
D	210.00	Moderately above average
D	230.00	Considerably above average
E	190.00	Slightly below average
E	205.00	Average
E	225.00	Slightly above average
E	245.00	Moderately above average
E	265.00	Considerably above average
E	295.00	Distinctly superior

Minimum Merit Rating Score Requirement

All job classifications require a minimum merit rating LOMA standard score comparable to a rating of "slightly below average". Employees are expected to maintain the necessary merit rating grades which are needed for the applicable salary scale. Where the latest rating produces a score that is below the applicable salary scale, the company will so inform the employee, and will explain the reasons for the lower rating. The company reserves the exclusive right to put the employee on a period of probation, or to reduce the salary to the rate applicable for the corresponding merit score, or to demote to the next lower job classification with a reduction in the rate of pay, or to discharge the employee at the expiration of the probationary period.

Special recognition

The company will give consideration to special recognition in the rate of pay within the maximum rate for job classifications "C" "D" and "E" where distinctly superior ability and job performance are in evidence.

Promotions to next higher job classification

In addition to the company's rules and requirements governing promotions, the following conditions must be met:

From A to B Requirement of 6 months continuous service on the "A" classification job and a minimum merit rating score of "slightly above average". The employee must submit and successfully pass the company's written test for "B" classification jobs.

From B to C Requirement of 3 months or more of continuous service on "B" classification job and a minimum merit rating score of "moderately above average". The employee must submit and pass successfully the company's written test for "C" classification jobs. A salary in-

crease of $5.00 per month is allowed upon the official promotion; thereafter, all subsequent salary increases in the new wage bracket and the new job classification are dated from the official date of the promotion.

From C to D Requirement of 3 months of continuous service on "B" classification job and 6 months of continuous service on "C" classification job, or 9 months of continuous service on "C" classification job; and a minimum merit rating score of "moderately above average". The employee must submit and pass successfully the company's written test for "D" classification jobs when required. A salary increase of $10.00 per month is allowed upon the official promotion; thereafter, all subsequent salary increases in the new wage bracket and the new job classification are dated from the official date of the promotion.

From D to E Requirement of 1½ years of continuous service on "D" classification job and a minimum merit rating score of "considerably above average". A salary increase of an amount that is the difference between the employee's rate of pay before promotion and the next higher wage bracket in the "D" wage promotion plan. Thereafter all subsequent salary increases in the new wage bracket and job classification are dated from the official date of the promotion.